12-31-2013

Moen v. State Appellant's Brief Dckt. 40600

IN THE SUPREME COURT OF THE STATE OF IDAHO

JAMES NEIL MOEN,	)	
	)	
Petitioner-Appellant,	)	S.Ct. No. 40600
	)	
vs.	)	
	)	D.Ct. No. 2011-3442
STATE OF IDAHO,	)	(Kootenai County)
	)	
Respondent.	)	
	)	

OPENING BRIEF OF APPELLANT

Appeal from the District Court of the First
Judicial District of the State of Idaho
In and For the County of Kootenai

HONORABLE MICHAEL J. GRIFFIN
Presiding Judge

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A. Nature of the Case

This is an appeal from the district court's judgment dismissing Mr. Moen's petition for post-conviction relief without an evidentiary hearing.

B. General Course of Proceedings

1. Underlying criminal proceedings

a. arrest and preliminary proceedings

On about March 2, 2008, Mr. Moen and his fiancee, "Kim," argued. *See* Augmentation[1] ("A") 269, ln. 12 - p. 270, ln. 6 (Kim's testimony at bond reduction hearing); CR 303. During the argument, Kim cut her lip by flinging herself out of bed and hitting a mirrored door. A 270, ln. 8-17. She then left with Mr. Moen's car and he called and informed her that if she did not return it, he would report that it was stolen. A 270, ln. 18-20. Being drunk and angry, Kim instead called the police and falsely claimed that Mr. Moen cut her lip. A 270, ln. 20-23. The responding officer informed Kim that he could not see any injury to her face arrest and thus could not arrest Mr. Moen. The officer repeatedly questioned her about a red mark on her neck which was caused by a skin condition. A 274, ln. 15-25. The officer told Kim he could arrest Mr. Moen if he had caused the mark and Kim eventually claimed to the officer that Mr. Moen pressed on her neck to quiet her. A 274, ln. 21-25; A 279, ln. 25 - 280, ln. 5. Kim later admitted: "Everything I wrote in that report was a lie because I was [angry] and I was afraid he was gonna get me arrested." A 281, ln. 27-29.

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[1] "Augmentation" refers to the various documents from the district court file Bates Numbered as 1-368, which this Court augmented into the record on September 16, 2013.

On March 10, 2008, Mr. Moen was arrested and charged with attempted strangulation against Kim. CR 303, 316. The state also alleged that Mr. Moen was a persistent violator of law based on alleged prior convictions from 1986, 1992 and 1995. On April 6, 2008, the prosecutor emailed an attorney representing Mr. Moen declining to agree to reduce bond in part because his "past victims" allegedly "suffered serious injury including broken bones" and the prosecutor thus considered him "to present a great threat of harm to his current victim." A 258, 349; CR 329. On April 18, 2008, the state alleged that Mr. Moen committed the felony offense of attempting to intimidate a witness. A 264, ln. 22-25.

On June 19, 2008, Kim wrote the attorney representing Mr. Moen and explained that he had not really hit her or placed his hands on her neck. CR 19-21. The case nonetheless remained set for trial on July 7, 2008. *See* CR 317. The day of trial the district court received an inmate request form from Mr. Moen pertaining to ineffective counsel and the jury trial was vacated. *Id.* An evaluation was conducted pursuant to I.C. § 18-211 and, on July 16, 2008, a psychologist submitted a report, which opined that Mr. Moen suffers from diagnoses of adjustment disorder with anxiety and personality disorders, but was competent. CR 151-154.

On July 23, 2008, counsel moved to withdraw. CR 318. On July 30, 2008, counsel withdrew the motion indicating the relationship was "a little tenuous but I think we're okay." A p. 259, ln. 12-21. That same day, the prosecutor recognized she could not "proceed on the felony charge" and amended the information from attempted strangulation to misdemeanor domestic battery. A 251-252; 266-268.

Kim then testified in support of Mr. Moen's request to reduce bond and explained that Mr. Moen had neither struck her nor attempted to strangle her. A 269-281. Despite Kim's

testimony and the reduction of the charge to a misdemeanor, the district court refused to reduce the $200,000 bond. A 295, ln. 10-37. However, the jail released Mr. Moen from custody once the attempted strangulation was amended to a misdemeanor. Tr. Vol 2 (35907)[2] p. 50, ln. 19 - p. 51, ln. 6.

On August 15, 2008, Mr. Moen was arrested for Driving Under the Influence ("DUI"), which the state contended was a felony based on two alleged prior convictions. A 94; Tr. Vol 2 (35907) p. 41, ln. 23 - p. 42, ln. 3. On September 11, 2008, the parties entered a binding Rule 11 agreement, which contemplated that Mr. Moen would plead guilty to the felony DUI, the state would dismiss the attempted intimidation of a witness, and the state would amend the domestic battery initially charged as attempted strangulation to a simple battery. The parties stipulated that the district court would retain jurisdiction and could impose an underlying sentence in its discretion. A 256-257.

b. change of plea

On September 11, 2008, the parties discussed the plea agreement on the record. The district court asked Mr. Moen for his plea to the misdemeanor battery and the following exchange occurred:

Mr. Moen:	Your Honor, I – I plead guilty because I realize it will get this no contact order dropped, so it, uh – so to prevent any more charges being brought up against me for breaking the no contact order I will go ahead and plead guilty to this.
Court:	Okay I'm going to ask you again for your plea
Mr. Moen:	Guilty
Court:	and it's either one word or it's two
Mr. Moen:	Guilty

[2] Mr. Moen will ask the district court to judicially notice the transcripts prepared for his direct appeal. Citations to the transcripts are accompanied by their docket numbers.

Court:	All right. As to the charge [of misdemeanor battery] how do you plead?
Mr. Moen:	Guilty
Court:	Now, tell me why you're pleading guilty to that particular crime. Did you do that crime?
Mr. Moen:	Uh –
Defense Counsel:	You have to plead on an *Alford* basis if you say you didn't do the crime.
Mr. Moen:	*Alford* plea then
Court:	Now tell me what information you've reviewed that, uh, would convince me that you know about the facts of that case
Defense Counsel:	He wants you to tell him basically what – what the State alleges that you did in that case.
Mr. Moen:	Oh, uh, at first it was attempted strangulation, but they seen that wasn't that so they amended it
Defense Counsel:	He wants to know the facts – he wants to know what happened, physically what happened that night. What is the evidence the State would put on? Do you understand?

(Discussion off the record between [defense counsel] and the defendant)

Defense Counsel:	Just tell him what the police report says. Remember reading the police report and what they claim that you did, and what happened that night? Not what you claim, what they claim. Do you understand my question?
Mr. Moen:	Yeah
Defense Counsel:	Okay. That's what the judge wants you to tell him. What does the State say that their evidence is against you. What would the State try to prove against you?
Mr. Moen:	Uh, that there was physical altercation.
Court:	Okay. Do you understand the State has evidence that would show that there was a physical altercation between you and [Kim]?
Mr. Moen:	Yeah
Court:	All right. Do you agree that if that evidence were believed by a jury that that could result in a conviction for the crime of battery?
Mr. Moen:	Yes.

Tr. Vol 2 (35907) p. 24, ln. 1 - p. 27, ln. 1.

Mr. Moen told the district court he did not understand the elements of battery and the district court informed him the state would have to prove that he "actually, intentionally,

unlawfully touched" Kim. *Id.* at p. 27, ln. 21 - p. 28, ln. 2. Mr. Moen and defense counsel conferred off the record between and Mr. Moen indicated on the record that counsel had told him the charge would not allege touching with force. *Id.* at p. 28, ln. 3-14. Defense counsel told Mr. Moen "I guess it sounds to me like we're about done here today" and Mr. Moen responded: "Fine. I'll plead guilty." *Id.* at p. 28, ln. 15-18. Mr. Moen then responded affirmatively when the district court inquired whether the state had evidence if believed by a jury could prove he "actually, intentionally and unlawfully touched and/or struck the person of [Kim]." *Id.* at p. 28, ln. 23 - p. 29, ln. 8. When the district court inquired whether Mr. Moen understood that he was waiving his right to appeal his guilty plea, Mr. Moen responded: "I thought you always had the chance – the opportunity to appeal." *Id.* at p. 32, ln. 19-24. The district court informed Mr. Moen that he waived his right to appeal his conviction in guilty plea but retained his right to appeal the sentence. *Id.* at p. 32, ln. 25 - p. 33, ln. 11.

During Mr. Moen's plea to the DUI, the district court explained that it was bound by the plea agreement to impose a period of retained jurisdiction ("Rider). The following exchange then occurred:

Court:	Even if you do well [on the Rider], I'm not bound by this agreement to put you on probation. Do you understand that?
Mr. Moen:	I had no idea.
Court:	It's true. So do you need to talk to [defense counsel] about that?
Mr. Moen:	Um, well, I was under the impression that if you do well and obey their rules and you show that you are worthy of probation that that's what you would be – what i would be doing is probation and I –
Court:	There is no guarantee

Id. at p. 39, ln. 23 - p. 40, ln. 10. The district court explained that it would receive a report and was not bound to follow the report's recommendation as relinquishment or probation. The

district court inquired whether Mr. Moen understood to which he replied: "I do now." *Id.* at p. 40, ln. 10 - p. 41, ln. 2.

After defense counsel informed the district court that a substance abuse evaluation had been prepared, the state and defense counsel indicated no other evaluations were needed. *Id.* at p. 48, ln. 4-12. p. 48, ln. 13-16. Although the existence of the prior I.C. § 18-211 evaluation suggested Mr. Moen's mental condition would be a significant factor at sentencing, the district court set the matter without ordering any additional evaluations.

c. sentencing

Mr. Moen appeared before the district court for sentencing on October 15, 2008. He informed the district court during his allocution that the prosecution used fictitious and bogus charges against him, including several felonies in the PSI that he had not heard of. Tr. Vol 2. (35907) p. 63, ln. 21-24. Mr. Moen also explained that he was innocent of most of the misdemeanors listed in his criminal history, including the battery for which he was being sentenced. *Id.* at p. 64, ln. 1-8. Counsel told the district court she had several clients plead guilty although innocent to secure release from jail. *Id.* at p. 69, ln. 4-21.

The district court inquired whether Mr. Moen believed the battery charge was a "bogus charge." *Id.* at p. 67, ln. 10-13. Rather than answer the district court's question, Mr. Moen responded "I just want to get my program going and I'll do whatever it takes." *Id.* at p. 67, ln. 14-16. Defense counsel reminded the district court that Mr. Moen entered an *Alford* plea to the battery and the district court inquired whether Mr. Moen believed there was evidence to prove that could result in his conviction if believed by a jury. *Id.* at p. 67, ln. 19 - p. 68, ln. 2. Mr. Moen responded: "I'm just gonna say yes. Yes. Sure." The district court indicated it would not

accept Mr. Moen's plea if he was " just saying the magic words" and defense counsel and Mr. Moen conferred off the record. *Id.* at p. 68, ln. 5-25. In response to the district court, Mr. Moen indicated not he was under duress to enter the plea agreement because of the other charges that were originally filed. *Id.* at p. 70, ln. 1 - p. 71, ln. 12.

The substance abuse evaluation provided to the district court for sentencing opined that Mr. Moen's scores on the various clinical measures indicated mental health problems and that "Mr. Moen's needs would best be served by obtaining a comprehensive medical evaluation and following all psychopharmacologic recommendations." CR p. 95. Mr. Moen told the court that he realized that he has mental health issues that had not been previously addressed and that could be confronted with medication. Tr. Vol 2. (35907) p. 63, ln. 14-16. Defense counsel noted that Mr. Moen had a dual diagnosis, that the evaluator had indicated that he suffers from an anxiety disorder and that further evaluation to explore treatment recommendations was recommended. Rather than request the recommended psychological testing prior to sentencing, defense counsel asked that the district court direct IDOC to perform an evaluation to explore whether medication was warranted. *Id.* at p. 79, ln. 10 - p. 80, ln. 1.

The district court indicated that it did not understand why neither Mr. Moen nor his attorney informed the court there was a need for a mental health evaluation because if one had been recommended, "I could've got you on medication between now and then." *Id.* at p. 82, ln. 15-20. The district court recommended that IDOC conduct a psychological evaluation. *Id.* at p. 90, ln. 9-11. However, because the court doubted IDOC would follow the recommendation, it advised counsel of the probable need to arrange an evaluation for the jurisdictional review. *Id.* at p. 90, ln. 11-16.

The district court retained jurisdiction for 180 days and the following exchange occurred:

Court:	My order indicates that I'm recommending to the Department of Corrections that they place you in a New Directions program, specifically Level A New Directions, due to your longstanding addiction to alcohol, the duration and extent of your criminal record and for the protection of society. If you come back with less than Level A treatment, I'll probably send you to the therapeutic community. I think you need as much treatment as you can --
Mr. Moen:	I realize this.
Court:	And if you get Level B or Level C, I'm gonna send you back to prison one way or another, either for another retained and have you get the Level A or have you do the therapeutic community.
Mr. Moen:	Will they – will they put me in the Level A?
Court:	It's up to them. I've made my recommendation. That's all I can do.

Id. at p. 81, ln. 20 - p. 83, ln. 3.

Mr. Moen continued to express concern regarding whether he would be placed in Level A and the following exchange occurred:

Court:	Level A is the most intense treatment you can get while on a retained. It's up to the Department of Corrections what they give you. I've requested Level A. That's all I can do. It's up to the Department of Corrections. If they don't give you Level A, then you need something additional, something additional inpatient, and that's either going to be another retained or it's going to be the therapeutic community.
Mr. Moen:	Well, what about if I take on special things, I mean double up while I'm in there if they put me under another level but yet I supersede that and take on more responsibilities, you know?
Court:	Let's hope they give you Level A.
Mr. Moen:	Do you see any reason why they wouldn't?
Court:	I'm not the Department of Corrections. All right? You can contact your attorney if you don't get into Level A, but you need that kind of treatment in order for me to even consider placing you on probation six months from now, so in my opinion you've got to get it, and it's up to the department to give it to you. If they don't, then

I won't put you on probation. Are we beyond that?

Mr. Moen: I suppose.

Id. at p. 84, ln. 12 - p. 85, ln. 25.

The district court retained jurisdiction for a period of up to 180 days.

d. period of retained jurisdiction

The district court's order retaining jurisdiction indicated:

> THIS COURT STRONGLY RECOMMENDS THAT LEVEL A BE UTILIZED DUE TO HIS LONG STANDING ADDICTION TO ALCOHOL, THE DURATION AND EXTENT OF HIS CRIMINAL RECORD, AND FOR PROTECTION OF SOCIETY.

CR. 68 (capitalization in original). The order further provided: "Please provide a mental health evaluation." CR 69.

The Idaho Department of Corrections ("IDOC") nevertheless failed to conduct a psychological evaluation, failed to determine whether Mr. Moen's mental illness could be treated with medication and failed to placed him in Level A. Instead, on November 10, 2008, Mr. Moen arrived at the North Idaho Correctional Institute ("NCIC"), which placed him in Level B. CR 97-102. Mr. Moen informed his counselor that the district court would send him to prison unless he completed Level A but she refused to change his placement. CR 164; Tr. Vol. 4 (35907) p. 35, ln. 19-21. Despite the emphasis in the district court's order, the counselor did not see Level A mentioned in the order and thus neither moved Mr. Moen to Level A nor verified whether Level B would result in relinquishment. Tr. Vol. 4 (35907) p. 89, ln. 7-15; p. 90, ln. 10-19; p. 91, ln. 4-11. Mr. Moen asked his counselor a second time about his need to be placed in Level A and after she said no, he asked to placed on his medication because he was having difficulty adjusting. *Id.* at p. 89, 14-19.

On December 1, 2008, Mr. Moen's attorney faxed a letter to the counselor explaining that the district court had made it "extremely clear" that Mr. Moen needed to be placed in Level A to avoid relinquishment and citing the provision of the judge strongly recommending that he be placed in Level A. A 298. Upon receipt of his copy of the letter, the district judge phoned the counselor and after discussion informed her to tell Mr. Moen his completion of Level B would not be held against him. A. 198. Instead of relaying this information to Mr. Moen, the counselor told Mr. Moen that the judge "had nothing good to say about" him, prohibited Mr. Moen from addressing his program level with others and informed him that he was in her program and "that's it." Tr. Vol. 4 (35907) p. 56, ln. 19 - p. 57, ln. 1. Although the counselor repeatedly indicated that Level B with anger management would be sufficient, she did not indicate that the district court had indicated he would be satisfied with those programs in lieu of Level A. *Id.* at p. 57, ln. 2-16. Mr. Moen's mind "goes a million miles a minute" and he repeatedly asked the counselor if he could take medication so he could slow down. *Id.* at p. 93, ln. 17-24.

Mr. Moen believed he would be "flopped" if he only completed Level B and thus did what he could to get into Level A and demonstrate to the district judge that he was serious about getting the treatment the judge believed he needed. *Id.* at p. 58, ln. 1-25; p. 59, ln. 6 - p. 60, ln. 1; p. 74, ln. 4-23; ln. 22-25. After Mr. Moen approached the deputy warden with his problem, he was enrolled in Level A and Level A Anger Management "which is the most intense level that you can do [which he believed the judge] would be proud of." *Id.* at p. 58, ln. 22 - p. 59, ln. 5; p. 88, ln. 23 - p. 89, ln. 2. However, while other counselors commended Mr. Moen for trying so hard to get into a harder class, his counselor insisted he would remain in Level B. *Id.* at p. 61, ln. 7-10; p. 88, ln. 23 - p. 89, ln. 2. On December 2, 2008, Mr. Moen was given a verbal warning

and ordered to speak only to his case manager, his anger management facilitator, and his unit officer regarding his placement. CR. 164.

On December 9, 2008, the counselor recommended that the court relinquish jurisdiction and IDOC returned Mr. Moen to the district court. CR. 162. Much of the problem with Mr. Moen's Rider revolved around his primary counselor's reaction to his concerns that he not been placed in Level A and anxiety that the district court would thus follow up on its promise to send him to prison. Tr. Vol. 4 (35907) p. 74, ln. 4-23; p. 81, ln. 2-19; p. 83, ln. 15-24. Other issues included Mr. Moen's inability to focus and alleged contact with Kim. *See* CR 100, 161; p. 80, ln. 15-21.

e. jurisdictional review proceedings

Mr. Moen appeared before the district court for a jurisdictional review hearing on January 14, 2009. Tr. (35097) Vol. 4, p. 1. In support of his request for probation, Mr. Moen provided the district court with his workbook, which reflected that he worked very hard in his classes. *Id.* at p. 5, ln. 1-4. Mr. Moen also wished to provide the court and state with a folder containing other work that illustrated his seriousness about his sobriety, which had not been received. *Id.* at p. 5, ln. 8-25. The unavailable documents also established that Mr. Moen prevailed in the disciplinary hearing ("DOR") regarding a letter he sent to Kim and other documentation and recordings in IDOC's possession that were important to rebut the adverse information in the Addendum to the Presentence Investigation ("APSI"). *Id.* at p. 6, ln. 5-17. Mr. Moen requested a continuance to obtain the records. *Id.* at p. 6, ln 1 - p. 7, ln. 10. The state objected to a continuance and argued that a jurisdictional review hearing should not be a "full blown evidentiary hearing" to "rehash everything that happened on the rider." *Id.* at p. 10, ln. 1-5.

The district court inquired whether Mr. Moen's family could pay for a psychiatric evaluation and the following exchange occurred:

Court:	the difficulty I have with [the I.C. § 18- 211 evaluation] of Mr. Moen is it was really done with the primary focus of finding out whether he was even competent to enter a plea or stand trial, and so it's not worth a whole lot as far as a diagnosis even though she does come up with a diagnosis.
Defense Counsel:	I guess – one question I would have is if Mr. Moen would be available for any state funding since there was already a guilty plea entered to have an evaluation performed from the Department [by statute]
Court:	There would be. The problem with that is how long it would take to get Mr. Moen in, and I am not willing to wait that long. He's been disruptive at the jail. He's been disruptive everywhere he's been, and I'm not willing to put our jail staff through that given the recommendation that's in the APSI. Recommendation's just go to prison. So if his family wants to put something together to where we can get a mental health evaluation from a psychiatrist in short order, I will grant a continuance and sign an order having him transported to a psychiatrist.

Id. at p. 11, ln. 11 – p. 12, ln. 10. Mr. Moen indicated he could pay for an evaluation. The district court indicated "there may be issues out there as far as type of treatment that should be ordered or recommended during probation or incarceration" and reiterated that the I.C. § 18-211 evaluation provided insufficient information. The district court thus acknowledged that further evaluation was required under the Court of Appeals' interpretation of I.C. § 19-2522 in *State v. Banbury*, 145 Idaho 265, 178 P.3d 630 (Ct. App. 2007). *Id.* at p. 16, ln. 19 - p. 17, ln. 14. On January 26, 2009, Mr. Moen's counsel requested an additional continuance because the mental health evaluation had not been completed and the state requested a continuance because an IDOC witness was unavailable. Tr. Vol. 3 (35097) p. 5, ln. 17 - p. 6, ln. 10.

On February 4, 2009, Kim scheduled and paid for a psychological evaluation on the first

available date, March 2, 2009. CR 15. On February 23, 2009, although the psychological evaluation had not yet been completed, Mr. Moen's attorney indicated he was ready to proceed. Tr. Vol. 4 (35907) 20, ln. 1-14. After a discussion off the record between Mr. Moen and his counsel the following exchanged occurred:

Defense Counsel:	Your Honor, my client – there is some information from [NICI] that we were trying to obtain which we don't have. I know the Court's position on the continuance. I do have Mr. Moen who wishes to make some statements, and I have [Kim] that will make some statements this morning.
Court:	Okay. So Just those two witnesses.
Mr. Moen:	Your Honor, I have some concerns. I don't understand why he said he's ready to proceed if we don't have the stuff from [NICI]. Why would my attorney say something like that?
Court:	Well, I don't know. That's something that you're going to have to ask and work out between –
Mr. Moen:	He won't answer me. I'm asking you, sir.
Defense Counsel:	Your Honor, there's some DOR records that we've been trying to get. [The prosecutor] has referenced those DOR records from the first hearing we've had. We still don't have that despite numerous phone calls, despite a subpoena. I know the Court's not inclined to continue this again, but that's where we are, trying to get some DOR records, copy of the DOR with – in which my client was sanctioned, and there is a DOR letter which was eventually – he succeeded on, and he wishes the Court to consider that. That is part and parcel of the – what's mentioned in the APSI, so whether or not that –
Mr. Moen:	And my witnesses that I asked you to have subpoenaed.
Defense Counsel:	There are some witnesses from [NICI], specifically counselors . . . [who] are expected to testify to, specifically . . .when Mr. Moen discussed his counseling into [Level] A and was put into [Level] A and then subsequently removed from [Level] A. That has been put forth by Mr. Moen in his lengthy testimony in letters to the Court which the Court should have records of. It's his position he was put into [Level] A.

Id. at p. 21, ln. 2 - p. 22, ln. 23. Mr. Moen explained there were sixty four pages of documentation that he asked his attorney to obtain and which would have verified his good effort

in classes and otherwise corroborated his explanations. *Id.* at p. 92, ln. 12 - p. 93, ln. 25. The records would have shown that Mr. Moen prevailed on a DOR concerning a letter to his fiancee and that he was treated very poorly during a hearing on another DOR. *Id.* at p. 44, ln. 2-19. The missing documentation and witnesses would have also corroborated that Mr. Moen's problems on the Rider centered regarding his concern in being placed in Level A, that Mr. Moen was placed in Level A and was taking anger management consistent with Level A. *Id.* at p. 40, ln. 21-25; p. 41, ln. 11-25. Another witness would have testified that the counselor who strongly recommended Mr. Moen's relinquishment spends time looking for people to weed out of the program. *Id.* at p. 43, ln. 5-15.

Defense counsel indicated the witnesses were unavailable telephonically because of the short notice given in the subpoenas. *Id.* at p. 23, ln. 4-11; *see also Id.* at p. 32, ln. 13-16 (warden indicating that subpoena's received via facsimile on 3:00 p.m. on Friday before the Monday hearing). Mr. Moen told the Court:

> Your Honor, I just truly want you to see that stuff, that information that I can present to you so you can see that, you know, I'm not deceiving you in any way. I really feel that information is important and that you must see it so you have a full understanding of what happened.

Id. at p. 24, ln. 5-10. After the district court personally called NICI, two of the five witnesses testified. *Id.* at p. 25, ln. 5 - p. 26, ln. 9. However, because the two witnesses did not have prior notice of the hearing, their memories of the pertinent events were vague. *Id.* at p. 27, ln. 12-14; p. 29, ln. 3-9; p. 31, ln. 1-3; p. 37, ln. 4-10. One officer testified that Mr. Moen was not a problem for him. *Id.* at p. 29, ln. 17-19; p. 30, ln. 13-24.

Mr. Moen testified and explained that he tried so hard to get into Level A because he

believed it was what the judge wanted and that the counselor did not tell him that the district court had said Level B would be sufficient. A 3-8; Tr. Vol. 4 (35907) p. 56, ln. 19 - p. 57, ln. 1.; p. 57, ln. 2-16; p. 116, ln. 16-24. Mr. Moen expressed that the counselor should have taken steps to alleviate his concerns and symptoms instead of telling him that the prison would not provide his medications or place him in Level A. *Id.* at p. 60, ln. 18-25. Mr. Moen told the judge he was very serious about his sobriety. *Id.* at p. 73, ln. 13-24.

Mr. Moen informed the district court that the county jail sent approximately seven pages of letters intended for his attorney to the district court. *Id.* at p. 109, ln. 17 - p. 110, ln. 12. Although the letters were in the court file, the district judge had not reviewed them and declined to take any action against the jail for forwarding attorney-privileged documents. *Id.* at p. 111, ln. 3 - p. 113, ln. 15. The district court indicated Mr. Moen had "extreme difficulty listening," that he was unable to accept responsibility and was a danger to society with his "drinking and with your violence." p. 114, ln. 12-24. The district court then faulted Mr. Moen for his difficulty trusting his counselor's representations that the court would accept Level B with anger management. *Id.* at p. 115, ln. 7 - p. 116, ln. 15. The district court relinquished jurisdiction and modified its previously imposed term of a unified term of eight years with a minimum period of confinement of three years to a unified term of eight years with a minimum period of confinement of a year and a half. *Id.* at p. 113, ln. 13-22; CR p. 71-73.

e. post-relinquishment

On June 12, 2009, Mr. Moen filed a pro se motion pursuant to Idaho Criminal Rule 35 asking that his time "be cut in half" because mental health issues were not addressed prior to sentencing and because the district court held the jurisdictional review hearing notwithstanding

Mr. Moen's representations that he was not ready to proceed. CR 75-77. The district court denied Mr. Moen's request for counsel and denied the motion. CR 80-81. Mr. Moen appealed from the district court's denial of his request for counsel and the denial of the Rule 35 motion. The Court of Appeals affirmed, noting that "In his opening brief, Moen informs the Court that he intends to pursue the lack of a psychological evaluation through a post-conviction action rather than through the instant appeal." CR 83-85.

In prison, Mr. Moen completed a number of programs and was not a disciplinary problem. CR 12-13. Nevertheless, Mr. Moen suffered greatly based on his mental health symptoms, which the prison was unequipped to address due to the absence of a psychological evaluation. *Id.* The prison removed Mr. Moen from the Therapeutic Community ("TC") program due to a mental health review on December 4, 2009, his pathway exception was refused in January 2010 and he became suicidal. CR 14. On April 26, 2010, the Parole Commission voided Mr. Moen's previously set Tentative Parole Date because IDOC would not permit him to "do TC now." CR 14. The Commission ordered a mental health evaluation and that another hearing be held in three months. CR 14.

On February 11, 2011, the Parole Commission denied parole and again ordered a psychological evaluation. CR 18. At some point, a psychological evaluation was conducted which reflected that Mr. Moen suffers from Schizoaffective Disorder, Bipolar Type; Generalized Anxiety Disorder, and Panic Disorder. CR 17. The evaluation also indicated that Mr. Moen has Antisocial Personality Disorder with Borderline Traits and that Attention Deficit Hyperactivity Disorder should be ruled out. CR 17.

2. Post-conviction proceedings

On April 11, 2011, Mr. Moen mailed a pro se post-conviction relief petition to the district court. CR 10; A 45, 212. The envelope containing the petition was returned to Mr. Moen stamped "refused" and the district judge's handwritten notation: "return to sender - court no longer has jurisdiction." A 45, 212. Mr. Moen again mailed his post-conviction relief petition with a letter informing the clerk that he was well within the statute of limitations to file the petition. A 1. This time, on April 26, 2011, the district court filed Mr. Moen's pro se petition for post-conviction relief.

In his post-conviction relief petition and supporting documents, Mr. Moen asked the district court to reduce his sentence to a four year fixed term and order that he be eligible for a driver's license as a result of judicial misconduct and ineffective assistance of trial and appellate counsel. CR 8-9. Mr. Moen requested that the content of his direct appeal be considered in support of his post-conviction relief petition. CR 23. Specifically, citing to portions of the transcripts prepared in conjunction with the direct appeal, Mr. Moen alleged that the district court's decision to proceed first with sentencing and then with the rider review without a proper psychological evaluation violated the Eighth and Fourteenth Amendments. CR 23. Mr. Moen noted that the district court failed to order such a psychological evaluation even after citing controlling law providing that such an evaluation was required and thus knowingly violated due process. Tr. Vol. 4 (35907) p. 7, ln. 2-10. Similarly, Mr. Moen cited specific portions of the transcripts and alleged that the failure of both trial attorneys to ensure a psychological evaluation for sentencing and the rider review violated the Sixth, Eighth and Fourteenth Amendments. CR 26-27.

Mr. Moen explained that as a result of the absence of a full evaluation, he did not receive mental health treatment which led to attempts to take his own life and an inability to meaningfully participate in programming. CR 23, 26-27. Had an evaluation been ordered and the recommended treatment available, Mr. Moen would have succeeded on his Rider or been granted parole. *Id.* Thus the district court's conduct and the deficiencies of trial counsel deprived him of needed treatment, placed his life in jeopardy, worsened his mental condition and unlawfully prolonged Mr. Moen's incarceration. *Id*

Mr. Moen also alleged that the district court violated the Eighth and Fourteenth Amendments by accepting his guilty plea to the battery as part of the plea agreement in the DUI knowing that Mr. Moen was innocent of that offense. CR 24, *citing* to Tr. (35907) Vol. 2, p. 24-35; p. 64, ln. 2-3; p. 67, ln. 4-8. Mr. Moen alleged that the district court used the Rule 11 agreement to coerce the plea and then violated that agreement by conditioning his Rider on his ability to get into Level A, knowing he could not get into Level A. CR 24 *citing* to Tr. (35907) Vol. 2, p. 87, ln. 20; Vol. 4, p. 66 ln. 10-11; p. 109-113. Mr. Moen further alleged the district court violated his rights by failing to adequately address the jail's decision to send letters protected by attorney-client privilege to the judge and refusing to allow Mr. Moen to present evidence, which hurt his ability to support his appeal. CR 24 *citing* to Tr. (35907) Vol. 4, p. 7, ln. 3-10; p. 21, ln. 11-25; p. 92, ln. 7-14; p. 117, ln. 5-7.

Mr. Moen also alleged that the attorney who represented him at the rider review provided ineffective assistance because he proceeded with the review hearing knowing Mr. Moen was not ready, made unfavorable remarks to the judge and refused to present sixty-four pages of evidence, which hurt Mr. Moen's appeal. CR 27-28, *citing* to Tr. (35907) Vol. 4, p. 5, ln. 16-22;

p. 6, ln. 2, 12,15,18; p. 7, ln. 7; p. 20, ln. 12-14; p. 21, ln. 4-19; p. 92, ln. 7-15; p. 117, ln. 5-7. Mr. Moen alleged that he received ineffective assistance of appellate counsel due to appellate counsel's failure to raise the issues presented in the petition.

On April 29, 2011, the district court appointed counsel to represent Mr. Moen in the post-conviction relief action and the office of the county public defender appeared on Mr. Moen's behalf. A 2, 5. On May 26, 2011, the state answered. CR 30-31. On June 2, 2011, Mr. Moen's counsel requested additional time to file an amended petition. A 6-7. On June 24, 2011, Mr. Moen filed a pro se "Motion To Amend Post Conviction Relief," on which the district court made a handwritten note to send the document via facsimile to Mr. Moen and State's attorney and that it was not "a filed pleading" since Mr. Moen has an attorney. A 10. The motion to amend directed Mr. Moen's counsel to raise additional post-conviction claims including his right to have all offenses presented to a grand jury, prosecutorial misconduct for alleging fabricated and trumped up charges, wrongfully alleging Mr. Moen was a persistent violator and possible tampering with evidence. A 12-13.

On July 26, 2011, new counsel substituted for the county public defender ("the second attorney"). A 16-17. On July 28, 2011, Mr. Moen filed a pro se "Motion To Amend Post Conviction Relief." In the motion, Mr. Moen listed multiple authorities and legal definitions and alleged he had not used the aliases on the NCIC. A 18-24. On July 28, 2011, Mr. Moen filed a pro se "Motion Requesting Conflict Attorney" asking the court to instruct the public defender's office to assign a conflict attorney. A 25. The district court made handwritten notes on both motions indicating that they were not "a filed pleading" since Mr. Moen was represented.

On September 1, 2011, the second attorney filed a "Supplemental Petition for Post

Conviction Relief" which claimed ineffective assistance of counsel at plea, sentencing and the rider review due to failure to seek a psychological evaluation. CR 36-43. Counsel argued that Mr. Moen was prejudiced by this deficient performance because his guilty plea was neither knowing nor voluntary and the absence of a mental health evaluation deprived him of an opportunity to meaningfully participate in the rider. CR 39-41. The absence of evaluation at the jurisdictional review prevented a full explanation of Mr. Moen's performance on his rider and deprived him of appropriate treatment at the prison, which interfered with his parole eligibility. CR 41-42. The supplement was not signed by Mr. Moen. CR 41-42; A 27-28.

On September 1, 2011, Mr. Moen personally filed an "Amendment to Post Conviction Relief," which submitted "a letter of instruction to" his attorney to prevent the violation of his constitutional rights in post-conviction relief proceedings. CR 32. Mr. Moen requested to be appointed co-counsel and that the state answer all allegations set out in his pro se pleadings. CR 34. Mr. Moen instructed his attorney to raise all claims contained in his pro se pleadings and to subpoena witnesses to support those claims including Kim, the district judge, the prosecutor and trial and appellate counsel. CR 34.

On September 19, 2011, Mr. Moen filed several pro se documents. First, Mr. Moen filed a motion to remove the district judge in his post-conviction relief case because the judge had ignored his mental health, which placed his life in danger by causing thoughts of suicide and extreme suffering, and acted in bad faith. A 30-32. Mr. Moen next filed a Motion To Amend And Or Supplement Judicial Misconduct alleging that the district judge sabotaged and complicated issues by contacting IDOC, that his actions created extreme distress and that his conduct violated the constitution. A 42-46. Mr. Moen also requested to be appointed co-

counsel, alleging that he had done almost all the work, his attorney was overloaded and had neglected key issues. A 33-35

Fourth, Mr. Moen filed a "Motion Requesting Mental Health Expert Testimony" to address the probable impact of inadequate diagnosis and treatment of his bi-polar, schizoaffective disorder, personality disorders and how the lack of such of treatment led to the development of suicidal tendencies. A 39-41. Mr. Moen also asked the district court to subpoena the judge, prosecutor, and trial counsel and to order preparation of a transcript of the hearing in which Kim testified that he was innocent of the battery. A 36-38, 47-48.

On September 23, 2011, Mr. Moen filed a pro se "Motion for Intervention Between Attorney/Client" asking the court to intervene and investigate why the second attorney was not willing to provide effective assistance, which was evidenced by the number of extensions and the attorney's efforts to discourage Mr. Moen from presenting issues and expressing belief in his guilt. A 49-51. That same day Mr. Moen filed a pro se supplement to his post conviction petition alleging the felony DUI was an infamous crime such that the Fifth Amendment required presentment to the grand jury and that the district court committed misconduct by allowing Mr. Moen to go into the penal system without adequately addressing his mental health. A 52-55. Mr. Moen also filed a pro se Petition for Proof of a True Bill of Indictment in the underlying criminal case. A 45-46.

On September 23, 2011, the district judge sent a letter to Mr. Moen's attorney outlining the various documents Mr. Moen had filed on his own behalf. A 98-99. The district judge indicated that: "While each of these documents bears a clerk's filing stamp, I am deeming none of these pleadings as having been filed. You will need to determine whether you adopt any of these

pleadings in order to change that status." A 98. On September 29, 2011, the case was transferred to a different district judge. A 58-65. Mr. Moen then sent a letter to the police and other law enforcement entities notifying them that the judge had attempted to remove documents from the court file that exposed his misconduct, including how his actions placed Mr. Moen's life at risk, and, thus, had unlawfully tampered with court documents. A 70.

In a letter dated October 11, 2011, the second attorney informed Mr. Moen that he had enclosed a supplemental petition, which he was in the process of amending to clarify certain claims and to add additional claims "i.e. a claim of ineffective assistance of counsel against your appellate counsel." A 137. The attorney indicated that he would be seeking additional time to file the supplemental petition, which he knew would make Mr. Moen unhappy, but indicated the additional time would ensure "that every claim is in there for appellate review." A 137-138.

On October 13, 2011, the second attorney filed a motion seeking additional time to file a supplemental petition indicating he had accumulated and reviewed substantial materials and since filing the supplemental petition, he had identified other claims including ineffective assistance of trial counsel and appellate counsel for failure to challenge the lack of mental health evaluation. A 71-74. Counsel also indicated that he needed to supplement the petition with a psychological evaluation and thus asked for an additional thirty to forty days to amend.

That same day, Mr. Moen filed pro se a "Motion to Amend and or Supplement Judicial/Prosecutorial Misconduct and Superseding Grand Jury Indictment." In addition to claims already asserted in his previous filings, Mr. Moen alleged that the district court further violated his constitutional rights by communicating with the counselor while Mr. Moen was on his rider. A 76. Mr. Moen alleged that the district court wilfully ignored the need for a

psychological evaluation – an evaluation to which no one objected – and medication. A 76, 78. Mr. Moen alleged that the district court should not have accepted his guilty plea to the misdemeanor because Kim's recantation proved that no crime occurred. A 78. Mr. Moen alleged that the district judge's conduct, including his remarks during hearings; allowing Mr. Moen's mental health to go untreated; his refusal to accept Mr. Moen's petition for post-conviction relief and other actions constituted misconduct. A 78. Mr. Moen alleged prosecutorial misconduct due to the prosecutor's false claims that Mr. Moen's prior "victims" had suffered serious injuries such as broken bones and wrongfully alleging Mr. Moen was a persistent violator although his record did not reveal two prior felony convictions. A 80. On October 14, 2011, the new district judge assigned to the case ordered that all motions on Mr. Moen's behalf be filed through counsel. A 100.

On November 18, 2011, counsel filed a second request for additional time to supplement Mr. Moen's petition, alleging that he had not received the requested psychological records from IDOC, which were critical to Mr. Moen's claims. A 105-107. On December 7, 2011, Mr. Moen filed a copy of a letter to his attorney in which he indicated that the court and attorney were responsible for his mental health. A 109. Mr. Moen indicated that he had asked to be moved to Orofino so that his mental health symptoms, including paranoia, could be addressed. A 109. Mr. Moen further indicated that he objected to any proceeding in which his attorney did not submit "all motions, issues, evidence, witnesses and requests to the court to insure adequate representation." A 109. On December 21, 2011, the district court received a letter from Mr. Moen in which he alleged his rights had been violated by the court and counsel and that counsel continued to use the need to obtain mental health records as an excuse for delay. A 110. Mr.

Moen attached a letter from the Idaho State Bar to his attorney asking that he respond to Mr. Moen's allegations of professional misconduct. A 111.

On February 3, 2012, the second attorney filed a Supplemental Petition for Post Conviction Relief, which was not signed by Mr. Moen. CR 52- 65. In addition to alleging ineffective assistance of counsel at plea, sentencing and the jurisdictional review, the attorney alleged that Mr. Moen's right to due process was violated by the district court's refusal to provide Mr. Moen with an I.C. § 19-2522 psychological evaluation prior to sentencing and the jurisdictional review hearing. CR 54-60. The supplement also alleged that Mr. Moen's right to due process as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution were violated when the state prosecuted Mr. Moen without obtaining an indictment from the grand jury. CR 61-62. Counsel indicated that although the PSI was not attached, it would be incorporated through the filing of a motion to unseal and take judicial notice of the report. CR 63. On March 1, 2012, the state answered and, on March 21, 2012, moved for summary disposition. CR 115-117; A 112-113. On March 12, 2012, the district court scheduled an evidentiary hearing on Mr. Moen's petition for November 2, 2012. CR 4.

On March 15, 2012, IDOC transferred Mr. Moen to a different facility as a result of visual hallucinations, paranoia and suicidal ideation. A 147. On April 27, 2012, an attorney with the county public defender's office substituted in as attorney of record ("the third attorney"). A 114-15. In a letter dated August 7, 2012, the third attorney outlined various issues Mr. Moen asked him to raise and listed those issues which counsel believed he could not ethically present. A 139-141.

In a letter dated October 1, 2012, counsel informed Mr. Moen that he "had prepared a

second amended petition that incorporated the issues that I can ethically raise [but lost that document] because of a computer malfunction." A 136. The attorney attached a rough draft that incorporated some of the issues ("Second Supplemental Petition for Post Conviction"). A 136-137; *see also* 185 (copy of the second supplemental petition). The attorney indicated the lost draft had alleged that the Rule 11 Agreement was not followed, that Mr. Moen's guilty plea was neither knowing nor voluntary, the judge's sentencing determinations were disparate, the district court acted improperly by continuing to rule on the case while a civil rights action was pending. A 136-137, 185. The attorney further indicated that he had prepared a motion to have Mr. Moen transported to the state hospital for mental health treatment but that he had not filed the motion because he was working on getting a hearing date. A 137.

On October 29, 2012, the third attorney moved to withdraw. A 116-117. On October 30, 2012, counsel filed a motion to produce the transcripts of Mr. Moen's arraignment and bond reduction hearing; change of plea hearing, sentencing hearing and the jurisdictional review hearings. A 118-119. Counsel also filed a motion for leave to amend the post-conviction relief petition. A 122-123. In a letter to Mr. Moen dated October 31, 2012, counsel confirmed that he had moved to withdraw based on "fundamental disagreements" and agreed that Mr. Moen's input at the upcoming hearing would be "absolutely essential." A 145.

The district court scheduled a hearing on the third attorney's motion to withdraw at the time previously set for Mr. Moen's evidentiary hearing and ordered that Mr. Moen could appear telephonically. CR 4. According to a November 1, 2012, telephonic hearing notice that IDOC provided Mr. Moen, he had a telephone hearing at 9:00 a.m. on November 2, 2012. A 146. Mr. Moen reported to the visiting center as instructed at 9:00 a.m. Mountain Standard Time and

remained until after 11:00 a.m. A 146. At 10:00 a.m. Pacific Standard Time (just after Mr. Moen had left), the district court called for Mr. Moen. Tr. (40600) p. 4, ln. 16-17. The prison informed the court that the notice indicated the hearing was scheduled for 9:00 a.m. and that it was 11:00 a.m. at the prison. *Id.* at p. 4, ln. 14-18. The prison further indicated that Mr. Moen "had just left" and could not be retrieved because he had left the visiting building. *Id.* at p. 4, ln. 18-24.

The district court indicated it was inclined to proceed on counsel's motion to withdraw in Mr. Moen's absence. *Id.* at p. 6, ln. 1-5. Counsel indicated that based on prior communications, Mr. Moen strongly objected to proceeding in his absence but there was a "significant ethical violation" that prevented him from continuing to represent Mr. Moen. *Id.* at p. 6, ln. 8-22. In response to the district court's request that counsel set forth the ethical violation, counsel indicated:

> we've reached the point in my representation of Mr. Moen that I cannot continue to represent him. I cannot try to protect his rights. I cannot divulge all of the explanation for that, but I can tell you he insists on me taking action which would - with which i have a fundamental disagreement. We disagree on what issues should be raised in this post-conviction hearing. We disagree on what the law is. We disagree on what witnesses of evidence should be presented.

Id. at p. 7, ln. 7-17. Counsel explained "I think there may be some merit in some of the issues he raises, but my heart is just not in it anymore . . . I simply no longer can give him the zealous representation he's entitled to." *Id.* at p. 10, ln. 8-16. Counsel indicated additional conflict public defenders were available pursuant to a new procedure and asked the district court to appoint replacement counsel to represent Mr. Moen. *Id.* at p. 10, ln. 16 - p. 11, ln. 22.

Although the prison had said Mr. Moen had "just left" at 11:00 a.m. (10:00 a.m. Pacific

Time), the district court found "he said that Mr. Moen had left at 15 after or something like that. I think he said 9:15 or something and didn't want to be there anymore" and thus that he intentionally failed to appear. *Id.* at p. 4, ln. 16-17; p. 13, ln. 20-25; p. 14, ln. 1-3. The district court allowed counsel to withdraw and ruled that it would appoint replacement counsel if it determined that Mr. Moen had raised non frivolous claims. *Id.* at p. 14, ln. 4-16. In a letter dated November 2, 2012, the third attorney indicated he had "just returned" from the hearing on his motion to withdraw, that the district court had proceeded and allowed him to withdraw, and to no longer attempt to communicate with the attorney. A 142-144.

On November 16, 2012, the district court received Mr. Moen's pro se "Motion For Rehearing On Summary Disposition To Preserve Thirty Constitutional Violations In P.C.R. That Attorney Failed To Do." A 132-321. Mr. Moen alleged that his previous post-conviction attorneys misled him into thinking they would raise his claims. A 132-134. Mr. Moen submitted correspondence from his second attorney in which the attorney indicated he would raise ineffective assistance of appellate counsel and then noted that the claim was not included in the supplemental petition submitted by that attorney. A 133, 137-138. Mr. Moen also attached the letter from the third attorney in which he admitted that he lost the draft petition due to a computer malfunction. A 135-136. Mr. Moen alleged that the attorney then moved to withdraw to escape responsibility. A 134.

In addition to claims raised in Mr. Moen's pro se materials and the supplemental petition, the motion for rehearing and attachments allege that the district court, prosecutor and attorney threatened, coerced and intimidated Mr. Moen's guilty pleas; the district court forced Mr. Moen to incriminate himself in the PSI; counsel refused to allow Mr. Moen to withdraw his plea, told

him to "shut up" and threatened that he would receive a life sentence unless he plead guilty; district court, prosecutor and trial counsel conspired to hurt or kill Mr. Moen by not addressing mental health issues; the district court wrongfully told Mr. Moen he waived his right to appeal; the district court did not confirm whether Mr. Moen had predicate prior DUIs to enhance the charge to a felony; no probable cause supported the traffic stop; Mr. Moen was not advised of his rights when arrested; he was denied representation on the Rule 35; the use of prior DUI's to enhance to a felony was an ex post facto law; Mr. Moen did not use the aliases listed in the PSI; trial counsel removed herself from the case after being denied permission to do so; the district court was random at sentencing; and the district court lacked jurisdiction since the law was not properly enacted. *See generally* A 132-321. Mr. Moen also alleged that the district court did not have the authority to deem that Mr. Moen's pro se documents were not filed and that under *Martinez v. Ryan*, 132 S.Ct. 1309 (2012) he had a right to competent counsel in post-conviction. A 137-138.

Also on November 16, 2012, the district court issued a Notice of Intent to Dismiss. A 126-129. First, the district court concluded that "the Supplemental Petition is not supported by evidence which would raise a genuine material issue of fact regarding any of the claims for relief set fort in the supplemental petition" and it therefore refused to appoint additional counsel to represent Mr. Moen. A 127. The district court then cursorily addressed Mr. Moen's claims regarding his right to an indictment and ineffective assistance of counsel and due process violations for failing to assure psychological testing prior to sentencing and the jurisdictional review. A 127-129. The district court concluded that the claims it addressed were unsupported and subject to dismissal and failed to address Mr. Moen's claims regarding the district court and

attorney's conduct with respect to his guilty pleas and the issues Mr. Moen raised in his pro se pleadings. The district court also issued an Order Allowing Withdrawal of Attorney finding that Mr. Moen had been brought to the visiting area to participate in the hearing via telephone "but had left and refused to participate." A 130. The district court further found that "the supplemental petition is unsupported by any evidence, and does not allege facts that raise possibility of a valid claim. A 130 (emphasis in original). The district court thus indicated it would not appoint further counsel. A 130-131.

On November 30, 2012, Mr. Moen filed a document titled "Motion To Dismiss Prosecutions 'Notice Of Intent To Dismiss' And Moves For Evidentiary Hearing," which discussed the issues raised in his pro se documents and in his motion for re-hearing to preserve the claims his attorney failed to raise. A 329-370. Mr. Moen also filed an "Affidavit for Judicial Prosecutorial and Attorney Misconduct in Post-Conviction Relief CR 2008-17503," which alleged judicial misconduct in the post-conviction case by stripping Mr. Moen of his right to counsel and his right to be present at hearings.

On December 10, 2012, the district court dismissed Mr. Moen's post-conviction relief petition finding that although he "filed additional documents" in response to the district court's notice of intent to dismiss, he "did not produce any admissible evidence to support his request(s) for post-conviction relief." CR 181. The district court also denied Mr. Moen's request for re-appointment of counsel, finding that he "has had the benefit of counsel, and yet has not presented grounds upon which relief could be granted." A 376-377. Mr. Moen appealed and submitted supporting documentation illustrating that he was entitled to relief, including those which the district court had not considered in dismissing his claims. CR 183-194; 199-452.

III. ISSUES PRESENTED ON APPEAL

1. Did the district court err in summarily dismissing Mr. Moen's claims because he presented issues of fact that entitled him to post-conviction relief?

2. Did the district violate Mr. Moen's right to due process and abuse its discretion by denying him of a meaningful opportunity to present his post-conviction claims, allowing counsel to withdraw and refusing to appoint replacement counsel?

3. Did the district violate Mr. Moen's right to due process in dismissing several of his post-conviction claims *sua sponte* and without prior notice?

IV. ARGUMENT

A. The District Court Erred in Summarily Dismissing Mr. Moen's Petition for Post-Conviction Relief Because He Presented an Issue of Material Fact as to Whether He Was Entitled to Relief

1. Standard of review

An application for post-conviction relief initiates a proceeding which is civil in nature. *Sparks v. State,* 140 Idaho 292, 295, 92 P.3d 542, 545 (Ct. App. 2004). Summary dismissal of a post-conviction action, either upon motion of the court or the state, is permissible only when the applicant's evidence has raised no genuine issue of material fact that, if resolved in the applicant's favor, would entitle him to the requested relief. *Goodwin v. State,* 138 Idaho 269, 272, 61 P. 3d 626, 629 (Ct. App. 2002). If such a factual issue is presented, an evidentiary hearing must be conducted. *Sparks,* 140 Idaho at 295, 92 P.3d at 545.

On review of a dismissal of a post-conviction relief action without an evidentiary hearing, the appellate court determines whether a genuine issue of fact exists based on the pleadings, depositions and admissions together with any affidavits on file. *State v. LePage,* 138 Idaho 803,

807, 69 P.3d 1064, 1068 (Ct. App. 2003). Moreover, the appellate court liberally construes the facts and reasonable inferences in favor of the non-moving party. *Goodwin,* 138 Idaho at 272, 61 P.3d at 629; *Ricca v. State*, 124 Idaho 894, 896, 865 P.2d 985, 987 (Ct. App. 1993).

2. Mr. Moen established an issue of material fact regarding whether he was entitled to relief due to the district court's failure to sua sponte order a psychological evaluation for sentencing and its decision to proceed with the jurisdictional review notwithstanding the unavailability of the scheduled psychological evaluation and other supporting documentation

A defendant is denied due process when the sentencing court relies upon information that is materially untrue or when the court makes materially false assumptions of fact. *State v. Gain*, 140 Idaho 170, 174, 90 P.3d 920, 924 (Ct. App. 2004); *State v. Dunn*, 134 Idaho 165, 172, 997 P.2d 626, 633 (Ct. App. 2000). To minimize the likelihood of such due process violations, three fundamental safeguards are required: (1) the defendant must be afforded a full opportunity to present favorable evidence; (2) the defendant must be given a reasonable opportunity to examine all materials contained in the presentence report; and (3) the defendant must be afforded a full opportunity to explain and rebut adverse evidence. *Gain*, 140 Idaho at 174-75, 90 P.3d at 924-25; *State v. Morgan*, 109 Idaho 1040, 1043, 712 P.2d 741, 744 (Ct. App. 1985).

These safeguards are in part implemented by Idaho Code § 19–2522(1), which requires the sentencing court to appoint a psychiatrist or psychologist to examine and report upon the defendant's mental condition "if there is reason to believe the mental condition of the defendant will be a significant factor at sentencing and for good cause shown." The language of this statute "clearly indicates that a psychological evaluation is mandatory" when the statutory criteria are met. *State v. Hanson*, 152 Idaho 314, 319, 271 P.3d 712, 717 (2012); *see also State v. Banbury*, 145 Idaho 265, 268, 178 P.3d 630, 633 (Ct. App. 2007), *citing State v. Coonts*, 137 Idaho 150,

152, 44 P.3d 1205, 1207 (Ct. App. 2002) (holding that the language of I.C. § 19–2522(1) "is mandatory, requiring that the trial court obtain a psychological evaluation whenever there is reason to believe that the defendant's mental condition will be of significance for the determination of an appropriate sentence"); *State v. McFarland*, 125 Idaho 876, 879, 876 P.2d 158, 161 (Ct. App. 1994) (holding that under I.C. § 19–2522, "a psychological evaluation and report are mandatory if there is reason to believe the mental condition of the defendant will be a significant factor at sentencing").

Section 19-2522(3) mandates that the examination report include specific information including a diagnosis, evaluation or prognosis of the defendant's mental condition; an analysis of the degree of the defendant's illness or defect and level of functional impairment; consideration of whether treatment is available for the defendant's mental condition; an analysis of the relative risks and benefits of treatment or nontreatment; consideration of the risk of danger which the defendant may create for the public if at large. A psychological evaluation conducted pursuant to I.C. § 18–211 to determine competence will often be insufficient to inform the court's sentencing decision because it does not address the factors delineated in I.C. § 19–2522(3). *Banbury*, 145 Idaho at 270, 178 P.3d at 635.

Moreover, the statute contemplates that the evaluation be conducted before sentence is imposed and only by requiring receipt of the evaluator's report before the sentencing hearing may the sentencing court ensure that the purpose of I.C. § 19–2522 will be fulfilled. Accordingly, the sentencing court violates Section 19-2522 by leaving it to IDOC to conduct an evaluation during a period of retained jurisdiction. *State v. Jockumsen*, 148 Idaho 817, 823, 229 P.3d 1179, 1185 (Ct. App. 2010); *Banbury*, 145 Idaho at 269, 178 P.3d at 634.

Here, the evaluation conducted pursuant to I.C. 18-211, the substance abuse evaluator's recommendation for a full mental health evaluation and the district court's own comments at both the sentencing and the jurisdictional review leave no doubt that Mr. Moen's mental condition was a significant factor at sentencing and that further evaluation of Mr. Moen's mental condition was required by controlling law. The district court nevertheless sentenced Mr. Moen and later relinquished jurisdiction without the benefit of an additional evaluation. The district court also refused to continue the jurisdictional review hearing to allow Mr. Moen time to obtain requested witnesses and documentation.

The district court thus deprived Mr. Moen of a full opportunity to present favorable evidence and to explain and rebut adverse evidence at both hearings. The district court's decision also twice deprived the IDOC of necessary information to treat Mr. Moen's mental illness and thus put Mr. Moen's life in danger and deprived Mr. Moen of a full opportunity to succeed on his rider and to later have a meaningful opportunity for parole. Accordingly, the district court's violation Mr. Moen's right to due process and I.C. § 19–2522 entitles him to post-conviction relief and the district court erred in summarily dismissing his petition.

a. the district court violated I.C. § 19–2522 and Mr. Moen's right to due process by proceeding with sentencing without a psychological evaluation

Well in advance of sentencing, the district court knew that Mr. Moen's mental condition was a significant factor as a result of the evaluation conducted pursuant to I.C. § 18-211 evaluation. CR 151-154. Additionally, the substance abuse evaluation provided to the district court for sentencing opined that Mr. Moen's scores on the various clinical measures indicated mental health problems and that "Mr. Moen's needs would best be served by obtaining a

comprehensive medical evaluation and following all psychopharmacologic recommendations." CR p. 95. Mr. Moen and his counsel also raised his mental condition and need for medication during the hearing. Tr. Vol. 2 (35907) p. 63, ln. 14-16; p. 79, ln. 10 - p. 80, ln. 1. The district court retained jurisdiction and the following exchange occurred:

Court:	I'm asking the Department of Corrections to provide you with a mental health evaluation. What I don't understand is back on September 11th when you pled and I scheduled this sentencing conference you and your attorney indicated that there was no need, none whatsoever for a mental health evaluation. We could've got one. I could've got you on medication between now and then.
Defense Counsel:	I think what happened, Your Honor, is –
Mr. Moen:	God, that would've been nice.
Defense Counsel:	I think what happened is I did not get the substance abuse evaluation that really recommended that more strongly than Dr. Parkman's evaluation, and so I would have to take responsibility.

Id. at p. 81, ln. 20 - p. 83, ln. 3.

Particularly in light of the foregoing exchange in which the district court acknowledged that Mr. Moen would benefit from medication prior to being sent on a Rider, it is indisputable that Mr. Moen's mental condition was a "significant factor" at sentencing.

The district court confirmed that Mr. Moen was not then taking any medications to treat his mental health condition and indicated:

Court:	I'm asking the Department of Corrections to provide you with a mental health evaluation. I doubt they'll do that, but they might. If they don't, then I'm going to require one from you at your own expense or through 19-2524 when you get back, and so [defense counsel] can be watching the time horizon and maybe get that ordered when you come back while you're waiting for hearing.

Id. at p. 90, ln. 9-16.

Even if the district court had faith IDOC would complete the recommended evaluation, it could not comply with the statute by recommending that IDOC conduct further testing. As

explained by the Court of Appeals:

> Section 19–2522 does not require a psychological evaluation merely to enlighten correctional officials who must make decisions on the defendant's conditions of confinement and treatment while incarcerated; the statute requires that the evaluation be conducted before sentencing so that the trial court will have the benefit of the evaluator's insights in fashioning an appropriate sentence.

Banbury, 145 Idaho at 269, 178 P.3d at 634, *citing Coonts*, 137 Idaho at 153, 44 P.3d at 1208.

Because the district court recommended that IDOC conduct a psychological evaluation instead of ordering one prior to sentencing, neither the district court nor IDOC had the information necessary to fashion an appropriate sentence, provide treatment and keep Mr. Moen safe. Accordingly, the district court abused its discretion in sentencing Mr. Moen without ordering a psychological evaluation pursuant to I.C. § 19–2522.

In summarily dismissing Mr. Moen's claim, the district court found that Mr. Moen's argument that the court should have sua sponte ordered a psychological evaluation prior to sentencing is an issue that should have been raised on direct appeal and is therefore not a proper ground for post-conviction relief. However, the district court's reasoning ignores that trial counsel failed to request a psychological evaluation prior to sentencing. Idaho's appellate courts will not consider error unless it is preserved for appeal through an objection in the lower court. *State v. Carter*, 155 Idaho 170, 307 P.3d 187 (2013); *State v. Perry*, 150 Idaho 209, 224, 245 P.3d 961, 976 (2010). Under a limited exception to this general rule, the appellate court will consider an error not preserved by an objection if the defendant persuades the appellate court that the alleged error: (1) violates one or more of the defendant's unwaived constitutional rights; (2) plainly exists (without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision); and (3)

was not harmless. *Carter*, 155 Idaho 170, 307 P.3d 187 (2013); *State v. Perry*, 150 Idaho at 224, 245 P.3d at 976. "If there is insufficient evidence in the appellate record to show clear error, the matter would be better handled in post-conviction proceedings." *Perry*, 150 Idaho at 226, 245 P.3d at 976.

The Idaho Supreme Court has held that the district court's violation of I.C. § 19-2522 does not implicate a constitutional right and, thus, the failure to sua sponte order such an evaluation is not reviewable under the fundamental error doctrine. *See Carter*, 155 Idaho 170, 307 P.3d 187. Accordingly, the statutory claim could not be raised on direct appeal and the district court erred in refusing to consider it in post-conviction.

In this case, the district court's violation of I.C. § 19-2522 violated Mr. Moen's right to due process. However, although implicating a constitutional right potentially reviewable under the fundamental error doctrine, Mr. Moen's claim that the district court violated his right to due process benefitted from factual development. Counsel not only failed to object to the district court sentencing Mr. Moen without the evaluation, she expressly requested that the district court ask IDOC to conduct further testing. The post-conviction record was necessary to establish that Mr. Moen did not waive his right to present the district court with relevant mitigating information.

Further, subsequent psychological testing revealed that Mr. Moen suffers from very serious mental illness frequently treated by medication documentation. Idaho Code Section 19–4901(a)(4) provides for post-conviction relief where the applicant demonstrates that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice. A post-conviction applicant seeking vacation of a challenged conviction or sentence on this ground establishes an issue of material fact by

presenting evidence of facts that existed at the time of sentencing that would have been relevant to the sentencing process and that indicate the information available to the parties or the trial court at the time of sentencing was false, incomplete, or otherwise materially misleading. *Knutsen v. State*, 144 Idaho 433, 440, 163 P.3d 222, 229 (Ct. App. 2007). One purpose of a psychological evaluation "is to assist the district court at sentencing in determining whether to recommend psychological treatment . . . during a defendant's confinement or probation." *Hanson*, 152 Idaho at 323, 271 P.3d at 721, *citing State v. Harper*, 129 Idaho 86, 91, 922 P.2d 383, 388 (1996).

In *Knutsen*, a neuropsychological evaluation that was unavailable in probation revocation proceedings conclusively diagnosed the petitioner with bi-polar disorder, a condition for which he was not being treated while on probation. The evaluation also discussed the improvement of petitioner's condition after he was diagnosed and appropriately medicated. The Court of Appeals reasoned that if the district court "had been made aware of *Knutsen's* bi-polar condition and the potential for effective treatment at the time it ordered probation, it might well have authorized treatment for that condition while Knutsen was on probation." *Knutsen*, 144 Idaho at 441, 163 P.3d at 230. The Court thus concluded that the evaluation raised a genuine issue of material fact as to whether the petitioner's unmedicated mental health problems played a substantial role in his probation violations and whether the evaluation would have led to a different outcome if the court had the opportunity to consider the evaluation when exercising its discretion in the sentencing process. *Id.* at 441-42, 163 P.3d at 230-31.

Here, the portion of the psychological evaluation Mr. Moen submitted in support of his post-conviction petition reflects that he suffered from bipolar type schizoaffective disorder, generalized anxiety disorder and panic disorder. Schizoaffective disorder is a mental condition

that causes both a loss of contact with reality (psychosis) and mood problems, which is treated with antipsychotic medicines and either antidepressant medicines or mood stabilizers. *See* U.S. National Library of Medicine as visited online November 25, 2013 at http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0001927/. Persons with generalized anxiety order harbor unrealistic and exaggerated fears that impact functioning and people with panic disorder have sudden and repeated attacks of fear of disaster or of losing control even when there is no real danger. *Id.* at http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0016272/ & http://www.nimh.nih.gov/health/topics/panic-disorder/index.shtml.

These diagnoses create far more functional impairment than the adjustment disorder discussed in the Section 18-211 evaluation. Had either the district court or IDOC been armed with the correct diagnoses and treatment recommendation, they could have concluded that Mr. Moen's placement at NICI was wholly inappropriate. In sending Mr. Moen on a Rider unequipped to meet his needs and without appropriate treatment, the district court's failure to order a full psychological evaluation set Mr. Moen up to fail on his Rider and placed his very life at risk by resulting in suicidal ideation. Mr. Moen's mental health symptoms, including racing thoughts and fixating on ideas, then interfered with his ability to succeed on the rider. The lack of a proper psychological evaluation directly contributed to the district court's decision to relinquish jurisdiction and deprived Mr. Moen of a meaningful opportunity to show he was a good candidate for probation.

The district court's decision to sentence Mr. Moen without a psychological evaluation deprived him of a full opportunity to present favorable evidence – including evidence on how best to treat his mental condition and keep him safe – and to explain and rebut adverse evidence.

Accordingly, Mr. Moen established an issue of fact by presenting evidence of facts that existed at the time of sentencing that would have been relevant to the sentencing process and that the information available to sentencing court was false, incomplete, or otherwise materially misleading.

b. the district court violated I.C. § 19–2522 and Mr. Moen's right to due process by proceeding with the jurisdictional review without a psychological evaluation and supporting witnesses and documentation

At the jurisdictional review hearing, Mr. Moen requested additional time to obtain documentation from IDOC to rebut the adverse information contained in APSI. The district court responded by noting that the I.C. § 18- 211 evaluation was "not worth a whole lot as far as a diagnosis" and inquired whether Mr. Moen's family could pay for a psychiatric evaluation. Tr. Vol. 4 (35907) p. 11, ln. 9-19. Counsel then inquired whether Mr. Moen could obtain state funding for the evaluation pursuant to statute. *Id.* at p. 11, ln. 20-24. The district court found there was but it was unwilling to continue the matter for the period of time necessary to obtain an evaluation at state expense because Mr. Moen had allegedly been disruptive at the jail. *Id.* at p. 11, ln. 25 – p. 12, ln. 11. The district court nonetheless granted a short continuance:

> Part of the reason for my granting this continuance is [*Banbury*], where the Court of Appeals anyway has determined that it's improper for a district judge to require a psychiatric evaluation later on, that the proper thing to do is to order one prior to sending someone on a retained, and I think a fair reading of that would be prior to sending somebody to prison if jurisdiction is relinquished if the Court's concerned that a person's mental health status has any bearing on true culpability for the offense, suitability for probation or the type of treatment tat should be ordered or recommended during probation or incarceration, and I think – I have no concerns as to Mr. Moen's mental health as far as it pertains to true culpability for the offense, but I think given the focus of [the 18-211] evaluation back last summer, there may be issues out there as far as type of treatment that should be ordered or recommended during probation or incarceration, so I just want to make a record in that regard.

p. 16, ln. 19 - p. 17, ln. 14.[3]

Given the foregoing history, it is beyond dispute that Mr. Moen's mental health condition was a "significant factor" at the jurisdictional review and that the district court was aware that controlling law required further evaluation prior to sentencing Mr. Moen. Nor did Mr. Moen's allegedly disruptive behavior provide justification for not complying with the statute. Indeed, Mr. Moen's behavior likely emanated from the very same mental conditions for which treatment recommendations would have been addressed in the evaluation the district court refused to order.

Despite its earlier acknowledgment that further evaluation was required, the district court later sentenced Mr. Moen to prison although the scheduled evaluation was still eight days away and the witnesses were unavailable and the documentation had not been received. In relinquishing jurisdiction, the district court accepted the counselor's version of what occurred during the Rider, found that Mr.Moen failed to accept responsibility and discussed Mr. Moen's difficulty following direction and his extreme anxiety regarding his placement in a program that would result in relinquishment. Had the district court appreciated the extent of Mr. Moen's illness and the role his unmedicated mental health problems played in his difficulties on the Rider, it might have determined that the goals of sentencing would be fulfilled by a course of action other than sending Mr. Moen to prison and recommending yet another program that Mr. Moen would be unable to complete due to his mental illness – the TC. *See also Knutsen*, 144 Idaho at 441-42, 163 P.3d at 230-31.

Thus, Mr. Moen's inability to provide mitigating information and to rebut the adverse

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[3] That the district judge recognized the necessity of a psychological evaluation and the probable impact of Mr. Moen's condition going untreated is reinforced by the fact that the judge who sentenced Mr. Moen also was the Mental Health Court judge for the judicial district.

information from NCIC contributed to the district court's decision to relinquish jurisdiction. Additionally, without proper treatment, Mr. Moen's mental health symptoms worsened in prison and he became tortured with thoughts of suicide. Unable to participate in the recommended TC program as a result of what was later determined to be schizoaffective disorder and anxiety diagnoses, Mr. Moen was denied parole and remains incarcerated well after serving the determinate portion of his sentence even though he has not been a disciplinary problem. The district court's decision to sentence Mr. Moen without further psychological testing thus violated Mr. Moen's right to due process.

The district court dismissed Mr. Moen's claim regarding the district court's failure to order psychological testing, finding that the claim should have been raised on direct appeal. As discussed above, however, such error would only be reviewable on direct appeal if there had been an objection. While Mr. Moen personally objected to proceeding with the hearing, his attorney did not. There were several off the record discussions after Mr. Moen's objections, the content of which would not be included in the record on direct appeal and which are relevant to whether the district court was obligated to address Mr. Moen's personal objection to the proceedings. The later testing establishes there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice. Thus, as with the failure to order the testing prior to sentencing, the claim was better raised in post-conviction where the record could be developed to establish that Mr. Moen did not waive his constitutional right to present mitigating information.

After the district court acknowledged that it was required to order an evaluation under I.C. § 19-2522, it refused to do so but provided a short continuance so that Mr. Moen could obtain a

private evaluation and secure additional information to address the information contained in the APSI. Then, although the evaluation was scheduled and Mr. Moen had still not received the necessary information from IDOC, the district court sentenced Mr. Moen to prison. The district court's decision to sentence Mr. Moen without waiting for the psychological evaluation or allowing additional time to obtain relevant documentation deprived him of a full opportunity to present favorable evidence, including evidence on how best to treat his mental condition, and to explain and rebut adverse evidence. Accordingly, Mr. Moen established an issue of material fact as to whether the district court violated his right to due process and the district court erred in summarily dismissing Mr. Moen's post-conviction relief petition.

3. Mr. Moen established an issue of fact as to whether he received ineffective assistance of counsel

a. pertinent legal standards

The right of a criminal defendant to counsel during trial is guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 13 of the Idaho Constitution. *See Gideon v. Wainwright*, 372 U.S. 335, (1963); *Milburn v. State*, 130 Idaho 649, 652, 946 P.2d 71, 74 (Ct. App. 1997). Before deciding whether to plead guilty, a defendant is entitled to "the effective assistance of competent counsel." *Padilla v. Kentucky*, 559 U.S. 356, ___, 130 S.Ct. 1473, 1480-81 (2010). A claim of ineffective assistance of counsel may properly be brought under the post-conviction procedure act. *Martinez v. State*, 143 Idaho 789, 795, 152 P.3d 1237, 1243 (Ct. App. 2007); *Murray v. State*, 121 Idaho 918, 924-25, 828 P.2d 1323, 1329-30 (Ct. App. 1992). A defendant claiming ineffective assistance of counsel will prevail if he shows that (1) counsel's performance was deficient and, that (2) counsel's deficient performance prejudiced the

defendant. *Strickland v. Washington,* 466 U.S. 668, 687 (1984).

A defendant meets the deficiency prong when counsel's performance falls below an objective standard of reasonableness. *Mitchell v. State*, 132 Idaho 274, 277, 971 P.2d 727, 730 (1998); *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). As a general matter, this Court will not attempt to second-guess counsel's strategic and tactical choices. *State v. Elison*, 135 Idaho 546, 551, 21 P.3d 483, 488 (2001). Nonetheless, this rule does not apply to counsel's decisions that are the result of inadequate preparation, ignorance of the relevant law, or other shortcomings capable of objective evaluation. *Id.* The prejudice prong is met when the defendant shows there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *Aragon,* 114 Idaho at 761, 760 P.2d at 1177; *Mitchell*, 132 Idaho at 277, 971 P.2d at 730.

b. Mr. Moen established an issue of fact as to whether he received ineffective assistance of counsel during plea negotiations and entry of plea

The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain. *Missouri v. Frye*, 132 S.Ct. 1399, 1407 (2012). Thus, "the negotiation of a plea bargain is a critical" stage for ineffective-assistance purposes. *Frye*, 132 S.Ct. at1406, *citing Padilla*, 130 S.Ct. at 1486; *see also Lafler v. Cooper*, 132 S.Ct. 1376, 1384 (2012); *Hill v. Lockhart*, 474 U.S. 52, 57 (1985). Where a petitioner alleges a guilty plea is invalid due to counsel's failure to provide sufficient advice, the petitioner can obtain relief by demonstrating that a decision to not plead guilty would have been rational under the circumstances. *Padilla*, 130 S.Ct. at 1485; *Hoffman v. State*, 153 Idaho 898, 905, 277 P.3d 1050, 1057 (Ct. App. 2012).

Mr. Moen and Kim both informed counsel that Mr. Moen neither battered nor attempted to strangle Kim. Mr. Moen alleged that counsel nonetheless told him to "shut up" and threatened that if he did not plead guilty, the district court would sentence him to life in prison. Mr. Moen further alleged that counsel informed him that several of her clients had plead guilty even though innocent and that she assured him that his driver's license would be suspended the minimum amount of time. Trial counsel also refused to allow Mr. Moen to withdraw his plea after she told him that she would seek to have his plea withdrawn.

The change of plea and sentencing hearings further support Mr. Moen's claim that he was innocent of the battery, that trial counsel provided incomplete advice and that Mr. Moen wished to withdraw his plea. When the district court asked Mr. Moen why he was pleading guilty to the misdemeanor battery, Mr. Moen indicated his motivation was to terminate the no contact order, entered his plea pursuant to *Alford*, and only acquiesced that the state had evidence to prove the offense after directed as to what the judge wanted Mr. Moen "to tell him." Tr. Vol 2 (35907) p. 24, ln. 1 - p. 27, ln. 1. Mr. Moen's responses establish that he was innocent and that he was only able to tell the district court what it wanted to hear after significant coaching.

When the district court explained that the amended information alleged that he "actually, intentionally, unlawfully touched [Kim]," Mr. Moen indicated defense counsel had told him the plea would not involve alleged force. *Id.* at p. 27, ln. 21 - p. 28, ln. 14. Counsel responded: "I guess it sounds to me like we're about done here today" and Mr. Moen indicated: "Fine. I'll plead guilty." *Id.* at p. 28, ln. 15-18. Mr. Moen then responded affirmatively when the district court asked whether he admitted the state had evidence that if believed by a jury would support a battery conviction. *Id.* at p. 28, ln. 23 - p. 29, ln. 8. Mr. Moen also expressed surprise and concern when

the district court indicated he had waived his right to appeal his guilty plea and when the district court indicated it was not bound to follow the jurisdictional review report's recommendation as to relinquishment or probation. *Id.* at p. 32, ln. 19 - p. 33, ln. 11; p. 40, ln. 10 - p. 41, ln. 2. Mr. Moen's responses and continual expressions of surprise suggest support that his plea was neither knowing nor voluntary.

During the sentencing hearing, Mr. Moen indicated he had never heard of most the "fictitious and bogus" felonies listed in the criminal history portion of his PSI and that he was innocent of most of the listed misdemeanors, including the battery charge for which he was being sentenced. *Id.* at p. 63, ln. 21 - p. 64, ln. 8. When the district court inquired whether Mr. Moen believed the misdemeanor battery to which he pled guilty was a "bogus charge," Mr. Moen replied that he just wanted to get his Rider programming started. *Id.* at p. 67, ln. 14-16. When the district court asked whether Mr. Moen believed the state has evidence that if believed by a jury would result in his conviction Mr. Moen responded "I'm just gonna say yes. Yes. Sure." *Id.* at p. 67, ln. 23 - p. 68, ln. 4. The district court indicated it would not accept Mr. Moen's plea if he just said "the magic words" and Mr. Moen conferred off the record with defense counsel. *Id.* at p. 68, ln. 5-25. Mr. Moen eventually responded affirmatively when the district court inquired whether he believed the state had evidence to prove a battery. *Id.* at p. 70, ln. 1 - p. 71, ln. 12.

Again, Mr. Moen continually articulated his innocence, exhibited difficulty understanding the proceedings and only gave the required responses after being urged and coached by his attorney. Further, counsel admitted that she had "plenty of clients" who were innocent but pleaded guilty to get out of jail. *Id.* at p. 69, ln. 1-25. Thus, the record supports Mr. Moen's contention that counsel coerced him to plead guilty to the battery although knowing he was

innocent, that she indicated he would be sentenced to life in prison if he did not and that his pleas were neither knowing nor voluntary.

As noted by the district court at sentencing, Mr. Moen only had one prior felony and the state therefore could not have supported its persistent violator allegation. *Id.* at p. 89 ln. 18-20. Thus, Mr. Moen did not face a life sentence and it was objectively unreasonable for counsel to coerce Mr. Moen into pleading guilty and to refuse to move to withdraw the plea when she knew that he was innocent.

The threat of a persistent violator violation is a significant inducement for any defendant to accept a plea offer that would otherwise be rejected. Because the state could support neither the persistent violator allegation nor battery charges, it would have been rational for Mr. Moen to reject the Rule 11 agreement and require the state to prove his guilt beyond a reasonable doubt. Accordingly, Mr. Moen established an issue of fact as to whether he received ineffective assistance of counsel during plea negotiations and the district court erred in summarily dismissing his petition for post-conviction relief.

c. Mr. Moen established an issue of fact as to whether he received ineffective assistance of counsel during the sentencing and jurisdictional review hearings

As discussed above in Section A(2) *supra*, Mr. Moen's mental condition was unquestionably a significant factor at the sentencing and jurisdictional review hearings and a psychological evaluation was thus required pursuant to I.C. § 19-2522. Further, such an evaluation would have provided favorable information to rebut adverse information relied on by the state and was thus required by the Due Process Clause of the Fourteenth Amendment. An accused receives ineffective assistance of counsel where trial counsel raises a defendant's mental

health at sentencing but fails to request or provide report satisfying statutory requirements for psychological reports to be used in sentencing and fails to object to imposition of sentence without benefit of such reports. *Vick v. State*, 131 Idaho 121, 125, 952 P.2d 1257 1261 (Ct. App. 1998); *see also Knutsen*, 144 Idaho at 443-44, 163 P.3d at 232-33.

The record establishes that the attorney representing Mr. Moen at sentencing and the attorney representing him at the rider review were aware of the significance of Mr. Moen's mental condition for purposes of determining an appropriate sentence and treatment. Nonetheless, the attorneys permitted the district court to twice sentence Mr. Moen without first obtaining a full psychological report. Later psychological testing conducted by IDOC establishes that Mr. Moen suffers from serious mental illnesses including bipolar type schizoaffective disorder, generalized anxiety disorder and panic disorder. Further, the record establishes that Mr. Moen's Rider, his ability to participate in programing after being sentenced to prison and his very life were compromised by his untreated mental health. Accordingly, Mr. Moen established an issue of fact as to whether he received ineffective assistance of counsel due to counsels' failure to object to proceeding with the sentencing and jurisdictional review hearings without a full psychological evaluation.

i. Mr. Moen established an issue of fact as to whether he received ineffective assistance of counsel during the sentencing

The attorney who represented Mr. Moen at sentencing received the report conducted pursuant to I.C. § 18-211 on July 29, 2008. Counsel nonetheless denied a need for an evaluation other than the substance abuse evaluation during the change of plea hearing. The substance abuse evaluation then recommended that Mr. Moen receive a full psychological evaluation with

pharmacological recommendations. Counsel nevertheless failed to request an evaluation prior to sentencing and instead recommended that IDOC conduct an evaluation while Mr. Moen was on his Rider. Because the district court doubted that IDOC would complete the recommended psychological evaluation, it alerted counsel that she should be ready to have one conducted prior to the jurisdictional review. However, after the district court denied counsel's motion to withdraw after sentencing, she nonetheless withdrew without making arrangements for a psychological evaluation. A 249.

The portion of the psychological evaluation Mr. Moen submitted in support of his post-conviction petition reflects that he suffered from bipolar type schizoaffective disorder, generalized anxiety disorder and panic disorder. As discussed above in Section A(2)(a), these are serious illness that cause loss of contact with reality, unrealistic and exaggerated fears that impact functioning and sudden and repeated attacks of fear of disaster.

Mr. Moen performed poorly on his Rider due to difficulty following direction, extreme anxiety about his placement in Level B and his mind going "a million miles a minute" – in other words, the typical symptoms associated with the mental health diagnoses that were unavailable to the district court or IDOC at the time Mr. Moen went on his Rider. A full psychological evaluation would have provided treatment recommendations and Mr. Moen's symptoms could have been addressed on the Rider. With his symptoms treated, Mr. Moen would have been able to participate meaningfully in programming and better control his anxiety regarding placement.

In dismissing this claim, the district court suggested that counsel was not deficient for failing to request a full psychological evaluation report prior to sentencing because an evaluation had been conducted pursuant to I.C. § 18-211. However, as the district court noted during the

jurisdictional review hearing, the I.C. § 18-211 was not "worth a whole lot" in terms of diagnoses. Tr. Vol. 4 (35907) p. 11, ln. 9-19. The substance abuse evaluator specifically recommended further testing. Because competency evaluations address different issues than evaluations for purposes of sentencing, often sufficient. *See Banbury*, 145 Idaho at 270, 178 P.3d at 635. Counsel's decision to allow the district court to proceed with sentencing without a complete and accurate picture of Mr. Moen's mental health and treatment recommendations is a shortcoming capable of objective evaluation.

The district court also concluded that Mr. Moen did not offer any evidence to support his claim he was prejudiced by the absence of the psychological report. However, as discussed above, Mr. Moen submitted part of a subsequent evaluation that illustrates he was later diagnosed with mental illnesses, the symptoms of which mirrored the behaviors that caused the district court to relinquish jurisdiction. This documentation[4] establishes that Mr. Moen was harmed by his attorney's failure to request psychological testing prior to testing. Accordingly, Mr. Moen established an issue of fact as to whether trial counsel's unreasonable failure to object to sentencing Mr. Moen without a psychological evaluation prejudiced him and the district court erred in summarily dismissing his petition.

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[4] The district court failed to specifically address any of the documentation Mr. Moen submitted in support of his petition. Thus, it is unclear whether the district court considered the facts alleged in the documentation insufficient or whether it declined to consider those facts at all because it found the documentation did not set forth admissible evidence. Nonetheless, as discussed below, Mr. Moen's documentation establishes the possibility of a valid claim entitling him to counsel even if the district court would have been correct in declining to consider the evidence as admissible in a post-conviction hearing.

ii. Mr. Moen established an issue of fact as to whether he received ineffective assistance of counsel during the jurisdictional review

As noted above, the district court informed counsel that a psychological evaluation should have been requested prior to sentencing and that such an evaluation likely would need to be arranged following the Rider since the district court doubted IDOC would conduct the evaluation recommended in the judgment. The attorney representing Mr. Moen at the jurisdictional review nevertheless failed to act in Mr. Moen's best interest by arranging psychological testing before Mr. Moen appeared before the district court for his jurisdictional review or to obtain the documentation from IDOC that would rebut the adverse information contained in the APSI. At the hearing, the district court indicated further testing was required by law but declined to order one at public expense because it did not want to delay the proceedings for the time necessary to obtain the evaluation. The district court granted a short continuance so that Mr. Moen could obtain an evaluation at his own expense and the documentation from IDOC.

Counsel served the subpoenas for the witnesses and documentation from IDOC late in the afternoon one working day before the jurisdictional review hearing and thus IDOC could not comply with the subpoenas prior to the hearing. Although the IDOC documentation was unavailable and the psychological evaluation was eight days away, counsel failed to request a continuance. Counsel's failure to request a continuance in these circumstances was objectively unreasonable.

In sentencing Mr. Moen to prison, the district court noted Mr. Moen's inability to control his extreme anxiety regarding his placement and difficulty focusing and attributed those difficulties to behavioral problems rather than mental illness. Had the district court known that

Mr. Moen suffered from bipolar type schizoaffective disorder, generalized anxiety disorder and panic disorder, it would have realized that Mr. Moen's difficulties instead stemmed from his mental illnesses, which could be treated with medication. Counsel's conduct deprived Mr. Moen of favorable information to rebut adverse information such as the counselor's testimony and that contained in the APSI. Accordingly, counsel's unreasonable failure to object to proceeding without an evaluation caused the district court to impose a sentence based on information that was false, incomplete and materially misleading.

In denying this claim, the district court found that Mr. Moen's claim regarding counsel at the Rider review was without merit because counsel requested an evaluation and "Mr. Moen was granted two continuances to obtain the evaluation." This reasoning ignores that Mr. Moen scheduled and paid for an evaluation[5] and that counsel failed to request an additional continuance so that the evaluation could be completed and Mr. Moen could obtain the other documentation from IDOC. In any event, counsel should have objected to the district court refusing to order the evaluation at state expense pursuant to I.C. § 19-2922 and requiring Mr. Moen to raise the funds to obtain his own evaluation.

Moreover, as a result of counsel's failure to ensure a proper evaluation, Mr. Moen suffered unduly in prison, his life was in jeopardy and he was unable to participate in programming necessary to secure release on parole. Without proper treatment, Mr. Moen was tortured by

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[5] Again, because the district court declined to specifically address any of the documentation Mr. Moen submitted in support of his petition, it is unclear whether the district court considered the letter from Dr. Ehlert verifying that he had a psychological evaluation scheduled for March 8, 2008 and similar documentation. Even if this Court concludes that the letter and other documentation did not set forth admissible evidence, the documentation would establish the possibility of a valid claim precluding dismissal without re-appointment of counsel.

suicidal thoughts and unable to participate in the therapeutic community program. Mr. Moen thus remains incarcerated well after completing his determinate term and the absence of a psychological evaluation unlawfully prolonged his incarceration.

Although the district court refused to order an evaluation pursuant to 19-2922, it provided a short continuance to allow counsel to obtain missing documentation and allow Mr. Moen to obtain a psychological evaluation on his own. Counsel nonetheless waited until the working day before the third setting of the hearing to serve the subpoenas on IDOC and neither the documentation nor the witnesses were available for the hearing. Counsel then failed to inform the district court of the scheduled evaluation or object to going forward with neither the evaluation nor the evidence. As a result of counsel's conduct, the district court relied on false and incomplete information in sentencing Mr. Moen, his life was jeopardized and his incarceration unduly prolonged. Accordingly, Mr. Moen established an issue of fact as to whether he received ineffective assistance of counsel and the district court erred in summarily dismissing his petition for post-conviction relief.

4. Mr. Moen established an issue of material fact as to whether he was entitled to relief because the district court violated his right to due process by accepting an invalid plea and violating the plea agreement

Mr. Moen alleged that the district court threatened, coerced and intimidated his guilty plea and violated the plea agreement by requiring Mr. Moen to complete Level A and setting him up to fail on his Rider. In order to be valid, a guilty plea must be voluntary. *Martinez v. State*, 143 Idaho 789, 792, 152 P.3d 1237, 1240 (Ct. App. 2007); *Huck v. State*, 124 Idaho 155, 161, 857 P.2d 634, 640 (Ct. App. 1993). A plea of guilty is deemed coerced where it is improperly induced by ignorance, fear or fraud. *State v. Spry*, 127 Idaho 107, 110, 897 P.2d 1002, 1005 (Ct. App.

1995). A post-conviction applicant who contends that his guilty plea is not knowing or voluntary raises a constitutional challenge that may be asserted through a post-conviction application. *Mata v. State*, 124 Idaho 588, 593, 861 P.2d 1253, 1258 (Ct. App. 1993); *see also Martinez*, 143 Idaho at 792, 152 P.3d at 1240 (reversing summary dismissal of post-conviction, in part because an issue of fact was presented as to validity of guilty plea); *Huck*, 124 Idaho at 161, 857 P.2d at 640 (addressing whether guilty plea was induced by coercion in post-conviction appeal).

As part of the requirement that guilty pleas be voluntary and intelligent, any promise or inducement on which the plea rests in any significant degree must be fulfilled. *Santobello v. New York*, 404 U.S. 257, 262 (1971); *State v. Stocks*, 153 Idaho 171, 173, 280 P.3d 198, 201 (Ct. App. 2012); *State v. Jones*, 139 Idaho 299, 301, 77 P.3d 988, 990 (Ct. App. 2003).

As discussed above in section A(3)(b) *supra*, the district court accepted Mr. Moen's plea to the misdemeanor battery despite his protestations of innocence and indications he did not understand the nature of the agreement or proceedings and was only saying the key words at the coaching of his attorney. There is thus an issue of fact as to whether the district court violated Mr. Moen's right to due process by accepting an involuntary and unintelligent plea. Mr. Moen was induced to enter the Rule 11 Agreement and plead to the felony DUI in large part by the state's insistence on prosecuting the unsupportable battery and persistent violator allegations. Moreover, while the actual sentence on the battery has long since expired, the district court and IDOC treated Mr. Moen as if he were a batterer in assessing his alleged danger to the community, restricting his communication with the supposed victim, Kim, and treatment recommendations such as anger management. Accordingly, Mr. Moen was harmed by the district court's unconstitutional acceptance of his invalid plea to the misdemeanor.

The district court further violated Mr. Moen's right to due process by imposing additional conditions to the plea agreement with which Mr. Moen could not comply. It is improper to impose a condition of probation that is impossible to fulfill and setting a defendant for failure cannot be said to be reasonably related to the ultimate goal of rehabilitation. *State v. Dicksen*, 152 Idaho 70, 266 P.3d 1175 (Ct. App. 2011). The plea agreement bound the district court to sentence Mr. Moen to a period of retained jurisdiction. Implicit in that term is a meaningful opportunity to succeed during the Rider and secure probation. However, the district court strenuously and repeatedly informed Mr. Moen that he would be sent to prison unless he completed Level A notwithstanding any recommendation that he be granted probation. As acknowledged by the district court, neither Mr. Moen nor the court had any control over whether Mr. Moen would be placed in Level A and, thus, the district court set up Mr. Moen for failure.

Ultimately, the district court's addition of the Level A requirement was Mr. Moen's undoing on the Rider. After IDOC refused to follow either the district court's recommendation for Level A or a mental health evaluation, Mr. Moen believed he would be sent prison. His anxiety and mania in combination with the district court's indication he had no chance at probation absent Level A interfered with his ability to accept placement in Level B. Mr. Moen's counselor recommended that the district court relinquish jurisdiction in large part as a result of Mr. Moen's efforts to secure placement in Level A. Therefore, the district court's unconstitutional imposition of additional terms in the plea agreement prejudiced Mr. Moen and deprived him of a meaningful opportunity to succeed on his Rider. Further, the plea agreement does not include an appellate waiver. *See* CR 309-10. The district court nonetheless informed Mr. Moen he was required to waive his right to appeal.

Mr. Moen established an issue of fact as to whether he was entitled to relief as a result of the district court due process violations in accepting an involuntary plea and unlawfully imposing additional conditions on the Rule 11 agreement. Accordingly, the district court erred in summarily dismissing Mr. Moen's petition for post-conviction relief.

5. Mr. Moen established an issue of material fact as to whether he was entitled to relief because the district court violated his right to a fair tribunal

Mr. Moen alleged the district court acted improperly by contacting his NCIC counselor and noted it was only days after their conversation that the counselor recommended that the district court relinquish jurisdiction. The county jail sent the district court about seven pages of letters from Mr. Moen to his attorney. Tr. Vol. 4 (35907) p. 109, ln. 17 - p. 110, ln. 12. Although the letters were in the court file, the district judge had not reviewed them and declined to take any action against the jail for forwarding attorney-privileged documents. *Id.* at p. 111, ln. 3 - p. 113, ln. 15. Mr. Moen also alleged that the criminal history and NCIC reflected aliases that he had never used, the district court failed to confirm whether he had the requisite prior DUIs to enhance the offense to a felony and that the district court forced him to incriminate himself in the PSI. The district court was aware that the statute required further evaluation of Mr. Moen's mental condition but nonetheless sent him on a Rider and then to prison without an evaluation and thereby placed his life in jeopardy and precluded meaningful opportunities to secure release through probation or parole.

The due process clause of the Fourteenth Amendment entitles a person to an impartial and disinterested tribunal and actual bias on the part of a decisionmaker is constitutionally unacceptable. *Owsley v. Idaho Industrial Com'n*, 141 Idaho 129, 135, 106 P.3d 455, 461 (2005).

"Impartiality" within the context of applying the Due Process Clause to judges means a lack of bias for or against either party to the proceeding and guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party. *In Republican Party of Minn. v. White*, 536 U.S. 765, 775–76 (2002); *Marcia T. Turner, L.L.C. v. City of Twin Falls*, 144 Idaho 203, 209, 159 P.3d 840, 846 (2007). Except to a limited extent otherwise authorized by law, a judge may not initiate or consider ex parte communications concerning a pending proceeding. *Athay v. Rich County*, 153 Idaho 815, 822, 291 P.3d 1014, 1021 (2012); *State v. Romano*, 662 P.2d 406, 407 (Wash. App. 1983). Even where there is no actual bias, justice must satisfy the appearance of fairness and the law goes farther than requiring an impartial judge as it also requires that the judge appear to be impartial. *Romano*, 662 P.2d at 407-08. A probationer is denied due process in connection with a probation revocation proceeding, when a probation officer submits a secret report to the court alleging information that the probationer did not learn prior to his revocation hearing. *In re Pers. Restraint of Boone*, 103 Wash.2d 224, 234–35, 691 P.2d 964 (1984).

Here, the district court personally called Mr. Moen's counselor upon receipt of the letter from trial counsel informing the counselor the district court had strenuously recommended Level A. According to the district court, the counselor and court discussed Mr. Moen's eligibility for Level A and the court instructed the counselor to tell Mr. Moen his inability to get into Level A would not be held against him. Rather than tell Mr. Moen that the district court approved his placement in Level B with anger management, the counselor told him the court had "nothing good to say about him."

By personally speaking with the counselor in the absence of Mr. Moen or his attorney, Mr.

Moen was deprived of the opportunity to respond to the information the counselor provided to the court and which undoubtedly influenced its later decision to relinquish jurisdiction. Further, Mr. Moen was deprived of the ability to participate in the call and inform the district court that he had actually succeeded in securing placement in Level A. Further, had the district court included the parties in the communication, Mr. Moen would have received the district court's indication his placement was acceptable. Because the counselor did not convey that information, Mr. Moen continued to seek placement in Level A, which resulted in the recommendation that the district court relinquish jurisdiction. The district court's communication with the counselor thus deprived Mr. Moen of his right to due process.

Moreover, the county jail provided the district court with letters Mr. Moen wrote to his attorney. Although the district court denied reviewing the letters,[6] the existence of privileged communications in the court file certainly raises the appearance of impropriety. The district court nevertheless declined to further address the jail's violation of Mr. Moen's attorney-client privilege in sending the information to the district court.

The district court communicated with the counselor outside Mr. Moen's presence, failed to address the attorney letters in the court file, failed to protect Mr. Moen's health by ensuring adequate mental health treatment and otherwise failed to act impartially. Accordingly, Mr. Moen presented an issue of fact as to whether the district court failed to act as a fair and impartial tribunal and the district court erred in summarily dismissing his petition for post-conviction relief.

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[6] The district court's comments during the discussion of the letters suggests it was unfamiliar with the file's contents and thus draws into question whether it had adequately prepared for Mr. Moen's review hearing.

6. Mr. Moen established an issue of material fact as to whether he was entitled to relief because the state violated his substantial right to be tried only on charges presented in an indictment returned by a grand jury

In Idaho, the state frequently prosecutes via complaint and presents only the more serious cases to the grand jury. However, the Fifth Amendment to the United States Constitution provides: "No person shall be held to answer for a . . . infamous crime, unless on a presentment or indictment of a Grand Jury." Because the right to be tried only on charges presented to a grand jury is a guarantee fundamental to our scheme of ordered liberty and system of justice, it is incorporated by the Fourteenth Amendment's Due Process Clause and applicable to the states. Because the state did not present Mr. Moen's DUI allegation to a grand jury, the conviction must be vacated.

Mr. Moen acknowledges that the Idaho Court of Appeals has held that a state felony prosecution proceeding by information, as a substitute for indictment, does not violate the due process required in the Fifth and Fourteenth Amendments where there is an examination and commitment by a magistrate certifying a finding of probable cause, aid of counsel, and a right to cross-examine the prosecution's witnesses. *Warren v. Craven*, 152 Idaho 327, 330-31, 271 P.3d 725, 728-29 (Ct. App. 2012). However, the *Warren* Court relied on *Hurtado v. California*, 110 U.S. 516 (1884), which held that the Due Process Clause did not make applicable to the States the Fifth Amendment's requirement that all prosecutions for an infamous crime be instituted by the indictment of a grand jury, in reaching its conclusion. The analysis utilized by *Hurtado* was revised by *McDonald v. Chicago*, 130 S.Ct 3020 (2010), which held that the Second Amendment right to keep and bear arms is fully applicable to the States by virtue of the Fourteenth Amendment. Application of the *McDonald* standard to the right to be indicted by the grand jury

establishes that the right applies to the states via the Fourteenth Amendment.

In *McDonald*, the Court recognized that, "Our governing decisions regarding the Grand Jury Clause of the Fifth Amendment and the Seventh Amendment's civil jury requirement long predate the era of selective incorporation." *McDonald*, 130 S.Ct at 3035, n.13. The *McDonald* Court further recognized that since *Hurtado*, the United States Supreme Court had "shed any reluctance to hold that rights guaranteed by the Bill of Rights met the requirements for protection under the Due Process Clause." *Id.* at 3034. In determining whether a particular provision of the Bill of Rights is incorporated in the Fourteenth Amendment's Due Process Clause, a court must decide whether the "guarantee is fundamental to our scheme of ordered liberty and system of justice." *Id.*

To determine whether a particular right is fundamental to our scheme of ordered liberty and system of justice, a majority of the United States Supreme Court has reviewed the history of the paricular right when the Bill of Rights was adopted and when the Fourteenth Amendment was ratified. *See e,g., McDonald*, 130 S.Ct. at 3036-3042. The right to a grand jury indictment is "deeply rooted" in this Nation's history and traditions. The right to a grand jury "reflects centuries of antecedent development of common law, going back to the Assize of Clarendon in 1166." *Russell v. United States*, 369 U.S. 749, 761 (1962). The right is an English institution, brought to this country by the early colonists and incorporated in the Constitution by the Founders. *Id.* After the Fifth Amendment was adopted, they were not left to the requirements of the common law in regard to the necessity of a grand jury or a mal jury, but there is the positive and restrictive languages of the great fundamental instrument by which the national government is organized. *Ex Parte Bain*, 121 U.S. 1, 6 (1887). By 1868, 29 states (78%) guaranteed the grand jury as a matter

of right and another three states used the grand jury without necessarily guaranteeing it as a right, bringing the total number of states that utilized grand jury proceedings to 32 (86%). Bryan H. Wildenthal, Nationalizing The Bill of Rights: Scholarship and Commentary on the Fourteenth Amendment In 1867-1873, 18 J. CONTEMP. LEGAL ISSUES 153, 214 - 215 (2009). In addition, a leading constitutional scholar at the time of ratification published treaties recognizing that the Fourteenth Amendment would incorporate the Grand Jury clause and make it applicable to the states. *Id* at 192-98.

Because the right to a grand jury proceeding is deeply rooted in this nation's history and traditions, as evidenced by its inclusion in the original Bill of Rights and by its continued use at the time of the ratification of the Fourteenth Amendment, it is a "guarantee (that) is fundamental to our scheme of ordered liberty and system of justice" and is incorporated into the Due Process Clause of the Fourteenth Amendment of the United States constitution and applicable to the states.

B. The District Court Violated Mr. Moen's Right to Due Process and Abused Its Discretion by Denying Him of a Meaningful Opportunity to Present His Post-Conviction Claims, Allowing Counsel to Withdraw and Refusing to Appoint Replacement Counsel

The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Thus, "failing to provide a post-conviction applicant with a meaningful opportunity to have his or her claims presented may be violative of due process." *See Schwartz v. State*, 145 Idaho 186, 189, 177 P.3d 400, 403 (Ct. App. 2008), *citing Hernandez v. State*, 133 Idaho 794, 799, 992 P.2d 789, 794 (Ct. App. 1999); *see also Abbott v. State*, 129 Idaho 381, 385, 924 P.2d 1225, 1229 (Ct. App.

1996); *Mellinger v. State*, 113 Idaho 31, 35, 740 P.2d 73, 77 (Ct. App. 1987) (Burnett, J., concurring). Similarly, although the decision to grant or deny a request for a court-appointed attorney lies within the discretion of the district court, "'[a]t a minimum, the trial court must carefully consider the request for counsel, before reaching a decision on the substantive merits of the petition.'" *Melton v. State*, 148 Idaho 339, 341, 223 P.3d 281, 283 (2009), *citing Charboneau v. State*, 140 Idaho 789, 794, 102 P.3d 1108, 1113 (2004). The United States Supreme Court has recognized that the status of an initial-review collateral proceeding as a prisoner's one and only appeal as to an ineffective assistance claim may justify an exception to the constitutional rule that there is no right to counsel in collateral proceedings. *Martinez v. Ryan,* 132 S.Ct. 1309, 1315 (2012)*; Coleman v. Thompson,* 501 U.S. 722, 111 S.Ct. 2546 (1991).

Here, from the time the district court refused to accept Mr. Moen's post-conviction relief petition contending it did not have jurisdiction, the district court deprived Mr. Moen of his right to a meaningful opportunity to present his post-conviction claims. After the district court filed Mr. Moen's second attempt to send his petition, counsel was appointed. However, the district court refused to consider Mr. Moen's repeated communications regarding his concerns concerning post-conviction counsel or to grant his request to obtain supporting information through subpoenas and experts. The district court then allowed counsel to withdraw, refused to appoint replacement counsel and dismissed the post-conviction action without addressing the majority of Mr. Moen's claims. Because the district court's actions were fundamentally unfair and deprived Mr. Moen of his due process right to a meaningful opportunity to be heard, the district court's dismissal must be reversed and the case remanded for appointment of competent counsel to assist Mr. Moen.

1. The district court violated Mr. Moen's right to due process by depriving him of an opportunity to support his claims

Upon receipt of Mr. Moen's pro se post-conviction relief petition, the district judge stamped the envelope "refused" and personally handwrote "return to sender - court no longer has jurisdiction." CR 10; A 45, 212. The district court filed Mr. Moen's second attempt to send his post-conviction relief petition and appointed counsel. A 1. However, when Mr. Moen informed the district court that his attorneys were not providing effective assistance, the district court refused to acknowledge or address the issues and instead deemed the correspondence "not filed." The district court also did not consider Mr. Moen or his attorney's requests to subpoena witnesses, to appoint a mental health expert to opine on the prejudice suffered from the lack of proper evaluation and treatment, to move Mr. Moen to the state hospital, to obtain mental health records from IDOC and to amend the petition.

Initially, requests to discharge counsel and complaints directed towards counsel's performance are a critical exception to the general rule courts may treat pro se pleadings filed while a person is represented as a nullity. *See In re Barnett*, 73 P.3d 1106, 1110 (Cal. 2003) (defendant who chooses professional representation, rather than self-representation, is not entitled to present his or her case personally *except* defendant may make pro se motions regarding representation, including requests for self-representation); *Whiting v. State*, 929 So.2d 673, 674-75 (Fla. App. 2006) (pro se pleadings filed by a criminal defendant who is represented by counsel are generally treated as a nullity *unless* they include an unequivocal request to discharge counsel, assert that counsel coerced the defendant into taking certain action, or reflect an adversarial relationship between the defendant and his counsel); *People v. Pondexter*, 573 N.E.2d 339, 345

(Ill. App. 1991) (defendant represented by competent counsel must not be permitted to file pro se motions *except* to afford the right to file pro se motions while represented that are "directed to defendant's attorney's representation"); *State v. Graddick*, 548 S.E.2d 210, 211 (S.C. 2001) (since there is no right to hybrid representation, substantive documents filed pro se by a person represented by counsel are not accepted *except* "the rule against hybrid representation does not bar pro se motions to relieve counsel"); *Williams v. State*, 946 S.W.2d 886, 892 (Tex. App. 1997) (court may consider pro se brief submitted by represented party when required by "the interests of justice").

The attorney further indicated that he had prepared a motion to have Mr. Moen transported to the state hospital for mental health treatment but that he had not filed the motion because he was working on getting a hearing date. A 137. The attorney also indicated that he had drafted a motion to withdraw, which was required because he believed he could not ethically raise issues that the client wishes raised. A 137. On October 29, 2012, that attorney filed a Motion To Withdraw. A 116-117. On October 30, 2012, counsel filed a motion to produce the transcripts of Mr. Moen's arraignment and bond reduction hearing; change of plea hearing, sentencing hearing and the jurisdictional review hearings. A 118-119. Counsel also filed a motion for leave to amend the post-conviction relief petition. A 122-123. In a letter dated October 31, 2012, counsel confirmed that he had moved to withdraw, based on "fundamental disagreements" and agreed that Mr. Moen's input at the upcoming hearing would be "absolutely essential" A 145. On October 30, 2012, counsel filed a motion to produce the transcripts of Mr. Moen's arraignment and bond reduction hearing; change of plea hearing, sentencing hearing and the jurisdictional review hearings. A 118-119. Counsel also filed a motion for leave to amend the post-conviction relief

petition. A 122-123. The district court nonetheless dismissed the petition without addressing these requests or securing Mr. Moen's input regarding his attorney's request to withdraw.

The documents Mr. Moen provided directly to the district court while he was represented informed the district court of his attorneys' refusal to provide effective assistance and requested that the district court provide Mr. Moen the ability to support his claims by issuing subpoenas and appointing experts. Given the nature of the information in these documents, the district court was obligated to address Mr. Moen's concerns and ensure that he had a meaningful opportunity to present his claims. Not only did the district court refuse to acknowledge Mr. Moen's concerns and requests by deeming the documents "not filed," it then dismissed his claims finding that he failed to provide admissible evidence demonstrating he was entitled to relief. In addition to ignoring Mr. Moen's pleas for the means to support his claims, the district court ignored counsel's similar claims.

Accordingly, the district court deprived Mr. Moen of a meaningful opportunity to present his claims and violated his right to due process. This case must be remanded to allow Mr. Moen an adequate opportunity to present his post-conviction claims.

2. The right to effective assistance of counsel in post-conviction relief proceedings is protected by due process

The Idaho Court of Appeals has repeatedly held that it is generally inappropriate to raise claims of ineffective assistance of counsel on direct appeal and such claims are more appropriately presented through post-conviction relief proceedings where an evidentiary record can be developed. *State v. Pentico*, 151 Idaho 906, 265 P.3d 519, 526 (Ct. App. 2011); *State v. Kellis*, 129 Idaho 730, 733, 932 P.2d 358, 361 (Ct. App. 1997); *see also Sparks v. State*, 140 Idaho 292,

296, 92 P.3d 542, 546 (Ct. App. 2004); *State v. Hayes*, 138 Idaho 761, 766, 69 P.3d 181, 186 (Ct. App. 2003); *State v. Mitchell*, 124 Idaho 374, 376, 859 P.2d 972, 974 (Ct. App. 1993).

Accordingly, an application for post-conviction relief is an initial-review collateral proceeding representing a prisoner's one and only appeal as to an ineffective assistance claim. *See Trevino v. Thaler*, 133 S.Ct. 1911 (2013); *Martinez v. Ryan,* 132 S.Ct. 1309, 1315 (2012). Without the help of an adequate attorney, a prisoner will have difficulty vindicating a substantial ineffective-assistance-of-trial-counsel claim. *Martinez,* 132 S.Ct. at 1317. Claims of ineffective assistance at trial often require investigative work and an understanding of trial strategy. *Id.* "While confined to prison, the prisoner is in no position to develop the evidentiary basis for a claim of ineffective assistance, which often turns on evidence outside the trial record." *Id.* A prisoner thus needs an effective attorney to present a claim of ineffective assistance of counsel in accordance with the state's procedures. *Id.*

Idaho courts have held that a prisoner may not claim ineffective assistance of post-conviction counsel because the applicant for post-conviction relief does not have a right to effective assistance of counsel. See *Rios-Lopez v. State,* 144 Idaho 340, 343, 160 P.3d 1275, 1278 (Ct. App. 2007), *Follinus v. State,* 127 Idaho 897, 908 P.2d 590 (Ct. App. 1995). However, Idaho relied on *Coleman*, which along with *Martinez* actually left open whether a prisoner has a right to effective counsel in criminal proceedings which provide the first occasion to raise a claim of ineffective assistance at trial. *See Martinez,* 132 S.Ct. at 1315. While the *Martinez* Court determined the case was not the one to resolve the issue as a constitutional matter, its reasoning suggests that effective assistance of counsel during post-conviction proceedings to vindicate claims of ineffective assistance of counsel is required by due process. *Id.* at 1315 ("As *Coleman*

noted, this makes the initial-review collateral proceeding a prisoner's 'one and only appeal' as to an ineffective assistance claim, and this may justify an exception to the constitutional rule that there is no right to counsel in collateral proceedings").

In refusing to re-appoint counsel, the district court said there was no point in re-appointment of counsel because Mr. Moen had counsel and failed to present viable claims. The district court thus ignored that by initially appointing counsel, it had already been determined that Mr. Moen presented valid claims – a conclusion reinforced by Mr. Moen's attorney who indicated Mr. Moen had viable claims and that counsel should be appointed. Moreover, Mr. Moen repeatedly alleged that counsel refused to adequately support his claims and requested that the district court allow him to subpoena witnesses, appoint a mental health expert and admit him to the state hospital. In addition, Mr. Moen's attorneys also notified the district court that additional records were necessary to support Mr. Moen's claims, including the full psychological report prepared during Mr. Moen's incarceration, the pre-sentence report, and transcripts. It was profoundly unjust to disregard Mr. Moen's request for assistance in developing the factual basis for his claims and then refuse to re-appoint counsel because such a factual basis was lacking.

In refusing to re-appoint counsel, the district court violated Mr. Moen's due process right to an effective attorney in post-conviction proceedings. Accordingly, the case must be remanded to allow Mr. Moen a meaningful opportunity to present his post-conviction claims.

3. Mr. Moen did not waive his right to counsel or to be present at the hearing

An evidentiary hearing was scheduled for November 12, 2012. Mr. Moen's attorney then asked the district court to take up various motions on that date instead of holding the evidentiary hearing, including counsel's motion to withdraw. Mr. Moen was granted leave to appear by

telephone and reported as instructed to the prison visiting center at 9:00 a.m. After waiting for two hours without a call from the court, Mr. Moen left the visiting center. The court finally called at 11:00. Although the prison official informed the district court that Mr. Moen had "just left," the district court found that Mr. Moen only waited fifteen minutes and waived his right to participate in the hearing. Counsel emphasized that Mr. Moen objected to proceeding in his absence but the district court nonetheless took up counsel's motion to withdraw without Mr. Moen's input. The district court's contrary finding that Mr. Moen refused to participate in the hearing is clearly erroneous.

Moreover, Mr. Moen's allegations regarding his attorneys' performance in post-conviction relief proceedings has support in the record. For instance, the second attorney informed Mr. Moen that he required additional time so that additional claims could be included in the supplemental petition, including ineffective assistance of appellate counsel, but then omitted that claim in the petition actually filed. The third attorney admitted losing the draft of an additional supplemental petition due to a computer malfunction. Notwithstanding all these difficulties, Mr. Moen at no time asked to proceed pro se and, instead, counsel moved to withdraw against Mr. Moen's wishes.

Counsel indicated that based on prior communications, Mr. Moen strongly objected to proceeding in his absence and that he "still believes he has an absolute right to dictate that he be present at all proceedings on any motion, but we do have a significant ethical violation for me to continue to represent Mr. Moen." Tr. (40600) p. 6, ln. 8-22. In response to the district court's request that counsel set forth the ethical violation, the third attorney told the court that Mr. Moen had became upset and angry on more than one occasion as a result of their disagreements and had

become upset and angry with other attorneys who had represented him. Tr. (40600) p. 7, ln. 21 - p. 8, ln. 3. Counsel indicated that the public defender's office previously unsuccessfully represented Mr. Moen but undertook the instant representation because Mr. Moen had filed bar complaints against the four available conflict defenders. *Id.* at p. 8, ln. 14 - p. 9, ln. 14. Such comments did not further Mr. Moen's interest in securing replacement counsel and instead communicated to the district court that Mr. Moen was difficult and discouraged appointment of additional counsel.

Mr. Moen repeatedly requested the assistance of effective counsel to assist in vindicating his post-conviction claims. Because he had viable claims and did not waive his right to representation, the district court violated his right to due process in dismissing the action without re-appointing an attorney.

4. Mr. Moen presented the possibility of valid claims and the district court thus abused its discretion and violated Mr. Moen's right to due process by failing to re-appoint counsel

In determining whether to appoint counsel, trial courts should bear in mind that applications and affidavits filed by pro se applicants will often be conclusory and incomplete because they may not know the essential elements of a claim. *Swader v. State,* 143 Idaho 651, 653, 152 P.3d 12, 15 (2007); *Judd v. State,* 148 Idaho 22, 24, 218 P.3d 1, 3 (Ct. App. 2009). Consequently, if the applicant alleges facts that give rise to the *possibility* of a valid claim, the trial court should appoint counsel in order to give the applicant an opportunity to work with counsel and properly allege the necessary supporting facts. *Charboneau,* 140 Idaho at 792-93, 102 P.3d at 1111-12; *Judd,* 148 Idaho at 24, 218 P.3d at 3.

The district court initially determined that Mr. Moen was entitled to counsel. Difficulties

and conflicts arose with the attorneys appointed to represent and the third attorney and Mr. Moen alleged that counsel refused to support his claims. In moving to withdraw, the last attorney appointed informed the district court that Mr. Moen had viable claims and was entitled to counsel but that he and Mr. Moen could not agree on the viability of other claims.

As discussed above, Mr. Moen presented issues of material fact entitling him to relief on each of the claims addressed in Section A *supra*. Even if this Court disagrees that Mr. Moen presented issues of material fact or that some of the documentation he presented does not constitute "admissible" evidence, he presented at least the possibility of valid claims. Accordingly, the district court violated Mr. Moen's right to due process and abused its discretion in failing to re-appoint counsel on those claims.

In addition to the claims discussed in above, Mr. Moen presented facts and argument that established the possibility of valid claims. Accordingly, the district court's refusal to re-appoint counsel also violated Mr. Moen's right to due process and constituted an abuse of discretion as to those claims.

a. ineffective assistance of appellate counsel

Idaho Code Section 19-852 gives a criminal defendant the right to be represented on any appeal. This right guarantees the right to effective assistance of counsel. *Hernandez v. State,* 127 Idaho 685, 687, 905 P.2d 86, 88 (1995). Further, the Due Process Clause of the Fourteenth Amendment requires states to ensure that an indigent appellant receive effective assistance of counsel on his first appeal of right from a judgment of conviction. *Evitts v. Lucey,* 469 U.S. 387, 396 (1985); *Aragon v. State,* 114 Idaho 758, 765, 760 P.2d 1174, 1181 (1988). Appellate counsel is required to make a conscientious examination of the case and file a brief in support of the *best*

arguments to be made. *Jakoski v. State,* 136 Idaho 280, 285, 32 P.3d 672, 677 (Ct. App. 2001); *LaBelle v. State*, 130 Idaho 115, 119, 937 P.2d 427, 431 (Ct. App. 1997).

Here, Mr. Moen alleged he received ineffective assistance of appellate counsel due to appellate counsel's failure to raise the claims raised in his post-conviction petition. While an appellant does not have the right to compel appellate counsel to raise every non frivolous claim, a post-conviction applicant can overcome the presumption of effective assistance by showing that the ignored issues are clearly stronger than those presented. *See Smith v. Robbins*, 528 U.S. 259, 288 (2000); *Mintun v. State*, 144 Idaho 656, 661, 168 P.3d 40, 45 (Ct. App. 2007).

The only issue raised in Mr. Moen's direct appeal was whether the district court erred by denying his request for appointment of counsel during the proceedings on his Rule 35 motion. According to the Court of Appeals' opinion, counsel represented that Mr. Moen intended to pursue the lack of a psychological evaluation through a post-conviction action rather than through the direct appeal. Several of the issues raised in Mr. Moen's post-conviction relief petition were stronger than the claim actually raised on direct appeal. It is also worth noting that the district court dismissed Mr. Moen's claim regarding the district court's failure to order a psychological evaluation as a claim that should have been raised on direct appeal. To the extent the district court's conclusion is correct, it was ineffective for appellate counsel to fail to raise the claim on direct appeal.

Mr. Moen alleged facts raising the possibility of a valid claim of ineffective assistance of appellate counsel. Accordingly, the district court violated Mr. Moen's right to due process and abused its discretion in refusing to re-appoint counsel.

b. prosecutorial misconduct

Although our system of criminal justice is adversarial in nature, and the prosecutor is expected to be diligent and leave no stone unturned, she is nevertheless expected and required to be fair. *State v. Field*, 144 Idaho 559, 571, 165 P.3d 273, 285 (2007); *State v. Timmons*, 145 Idaho 279, 287, 178 P.3d 644, 652 (Ct. App. 2007).

Here, Mr. Moen alleged that the prosecution acted improperly by falsely accusing him of breaking prior victims' bones in an effort to obtain a guilty plea to the charge of attempted strangulation, which the state knew could not be proven. Mr. Moen also alleged that the prosecutor coerced his plea by alleging he had predicate felonies to support a persistent violator allegation and tampering with evidence.

The facts alleged by Mr. Moen raise the possibility that the prosecutor committed misconduct. Accordingly, the district court violated Mr. Moen's right to due process and abused its discretion in refusing to re-appoint counsel.

c. ineffective assistance of counsel for failure to file a motion to suppress

In a post-conviction proceeding challenging an attorney's failure to pursue a motion in the underlying criminal action, the district court may consider the probability of success of the motion in question in determining whether the attorney's inactivity constituted incompetent performance. *Baldwin v. State*, 145 Idaho 148, 155, 177 P.3d 362, 369 (2008); *Lint v. State*, 145 Idaho 472, 477, 180 P.3d 511, 516 (Ct. App. 2008). Where the alleged deficiency is counsel's failure to file a motion, a conclusion that the motion, if pursued, would not have been granted by the trial court, is generally determinative of both prongs of the *Strickland* test. *Hoffman*, 153 Idaho at 905, 277 P.3d at 1056; *Boman v. State*, 129 Idaho 520, 526, 927 P.2d 910, 916 (Ct. App. 1996).

Conversely, counsel's failure to file a motion to suppress that could have succeeded and altered the outcome of the case constitutes ineffective assistance of counsel. *See Baldwin*, 145 Idaho at 157, 177 P.3d at 371; *Lint,* 145 Idaho at 480, 180 P.3d at 519.

Here, Mr. Moen alleged that the arresting officer failed to advise him of his rights pursuant to *Miranda* and that contrary to the officer's allegation, Mr. Moen's headlights were operational and there was thus no probable cause to support the traffic stop. A 213-223; *see also* police reports attached to the PSI.[7] Mr. Moen thus alleged that trial counsel should have obtained additional discovery such as the video and filed a motion to suppress.

These facts raise the possibility of a valid claim of ineffective assistance of counsel for failure to file a motion to suppress. Accordingly, the district court violated Mr. Moen's right to due process and abused its discretion in refusing to re-appoint counsel.

d. enhanced penalty DUI statute is an ex post facto law as applied to Mr. Moen

Article I, Section 10, of the United States Constitution prohibits a state from passing an ex post facto law including laws that make a crime greater than it was when committed and those that inflict a greater punishment, than the law annexed to the crime, when committed. *Calder v. Bull*, 3 U.S. 386, 390 (1798); *State v. Lamb*, 147 Idaho 133, 135. 206 P.3d 497, 499 (Ct. App. 2009). Mr. Moen alleged that the enhancement penalty provision of DUI statute was an ex post facto law as applied to him. Mr. Moen acknowledges that the Idaho Court of Appeals has held that the DUI statute does not constitute an ex post facto law and that the Idaho Supreme Court "obliquely" rejected the argument in *Freeman v. State*, 131 Idaho 722, 963 P.2d 1159 (1998).

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[7] This Court augmented the PSI into the appellate record on September 27, 2013.

State v. Nickerson, 132 Idaho 406, 412, 973 P.2d 758, 764 (Ct. App. 1999); *see also Lamb*, 147 Idaho at 135, 206 P.3d at 499.

However, it does not appear that the United States Supreme Court has directly decided whether the enhancement penalty provision of the DUI statute is an ex post facto law and thus the claim was validly presented for purposes of obtaining further review. Moreover, as argued by the defendant in *Lamb*, *Stogner v. California*, 539 U.S. 607, 612 (2003) changed the relevant law. While the Court of Appeals rejected that argument in *Lamb*, the issue has not been addressed by the Idaho Supreme Court. Accordingly, Mr. Moen presented the possibility of a valid claim and the district court violated Mr. Moen's right to due process and abused its discretion in refusing to re-appoint counsel.

e. Mr. Moen could not be punished for felony DUI because did not have requisite predicate offenses

Mr. Moen alleged that he could not be charged with a felony DUI because his prior offenses did not qualify as predicate offenses. A defendant may be punished for a felony DUI only if he has been found guilty of or has pled guilty to two or more violations of the provisions of Idaho Code Section 18-8004(1)(a), (b) or (c) or a substantially conforming foreign criminal within ten years. I.C. § 18-8005(6). If Mr. Moen did not have two prior qualifying DUI convictions, his felony conviction was improper. Accordingly, he presented the possibility of a valid claim and the district court violated Mr. Moen's right to due process and abused its discretion in refusing to re-appoint counsel.

f. DUI statutes void because not properly enacted

The Idaho Constitution provides that the legislative power of the state is vested with the

senate and house of representatives and that the "enacting clause of every bill shall be as follows: 'Be it enacted by the Legislature of the State of Idaho.'" IDAHO CONST Art. III, § 1. Mr. Moen alleged that a statutes Enactment Clause must be readily ascertainable to the public and thus included in the published versions of the statutes. A 229- 248. Because the published Idaho Code does not include the Enactment Clause, the statute under which he was convicted was unconstitutional and his conviction invalid. Because Mr. Moen raised the possibility of a valid claim, the district court violated Mr. Moen's right to due process and abused its discretion in refusing to re-appoint counsel.

g. disparate sentencing

Mr. Moen alleged that the district court randomly sentenced others convicted of similar offenses to different terms of imprisonment. Mr. Moen acknowledges that in Idaho, disparate sentences between different defendants for committing similar crimes does not constitute excessiveness of sentence as to any particular defendant. *Holmes v. State*, 104 Idaho 312, 658 P.2d 983, 986 (Ct. App. 1983). Nonetheless, the due process right to a fair tribunal guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party. *In Republican Party of Minn. v. White*, 536 U.S. 765, 775–76 (2002); *Marcia T. Turner, L.L.C. v. City of Twin Falls*, 144 Idaho 203, 209, 159 P.3d 840, 846 (2007). Mr. Moen presented the possibility of a valid claim as to whether bias prevented the district court from applying the law and facts in sentencing Mr. Moen the same as any other defendant. Accordingly, the district court violated Mr. Moen's right to due process and abused its discretion in refusing to re-appoint counsel.

h. cruel and unusual punishment

As set forth above in Section A(2) and 3(c), as a result of the absence of a proper psychological evaluation, Mr. Moen's mental illness was not treated, he became suicidal, could not participate in treatment and his incarceration was prolonged. Mr. Moen repeatedly alleged that he was thus subjected to cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. Imprisonment may result in cruel and unusual punishment if adequate medical facilities are not provided. *State v. Clay*, 124 Idaho 329, 332, 859 P.2d 365, 368 (Ct. App. 1993). Mr. Moen presented the possibility of a valid claim as to whether the absence of a psychological evaluation resulted in cruel and unusual punishment. Accordingly, the district court violated Mr. Moen's right to due process and abused its discretion in refusing to re-appoint counsel.

i. even if the various violations are harmless individually, they cumulatively deprived Mr. Moen of his right to counsel and to due process

Mr. Moen alleged that the number of violations he suffered during criminal and post-conviction proceedings amounted to a violation in itself and illustrated a consistent pattern of unfair treatment. A 138, 333, 350. Under cumulative error doctrine the accumulation of irregularities, each of which in itself might be harmless, may in the aggregate violate due process.. *State v. Ciccone*, 154 Idaho 330, 297 P.3d 1147, 1160 (Ct. App. 2012); *State v. Moore*, 131 Idaho 814, 823, 965 P.2d 174, 183 (1998). The doctrine of cumulative error can be applied in a post-conviction action. *See Boman v. State*, 129 Idaho 520, 927 P.2d 910 (Ct. App. 1996) (recognizing potential application of the cumulative error doctrine to ineffective assistance claim but finding no applicability in that case because no error was found); *Reynolds v. State*, 126 Idaho 24, 878 P.2d

198 (Ct. App. 1994) (finding that post-conviction applicant failed to make a sufficient showing that the cumulative effect of all the errors at trial amounted to ineffective assistance).

Mr. Moen presented the possibility that he was harmed by the cumulative effect of the many violations. Accordingly, the district court violated Mr. Moen's right to due process and abused its discretion in refusing to re-appoint counsel.

C. The District Court Violated Mr. Moen's Right to Due Process in Dismissing Several of the Claims Raised by Mr. Moen in Post-Conviction Proceedings *Sua Sponte* and Without Prior Notice

In the supplemental petition for post conviction relief filed through counsel, counsel alleged Mr. Moen received ineffective assistance of counsel at the plea, sentencing and rider review hearings; that his right to due process was violated when the district court sentenced him to the Rider and later to prison without a psychological evaluation; and that his right to due process was violated when the state prosecuted Mr. Moen without obtaining an indictment from the grand jury. CR 52- 65. In Mr. Moen's pro se submissions – those submitted both while represented and after the district court forced him to proceed pro se– he alleged that the district court violated his constitutional rights by accepting an involuntary plea, ineffective assistance of counsel appellate counsel, prosecutorial misconduct, ineffective assistance of counsel for failure to file motion to suppress, the enhanced penalty DUI statute is an ex post facto law as applied to Mr. Moen, he could not be punished for felony DUI because did not have requisite predicate offenses, the DUI statutes are void because not properly enacted, disparate sentencing and that the cumulative effect of all the violations violated his constitutional rights.

The state moved for summary dismissal and alleged Mr. Moen only supported his ineffective assistance of counsel claims by conclusory allegations. In approximately a page of

argument, the state did not discuss any of Mr. Moen's specific claims. The district court's notice of intent to dismiss specifically (albeit briefly) addressed the claims raised in the supplemental petition filed through counsel except the claim alleging ineffective assistance of counsel during plea. The district court failed to address the ineffective assistance of counsel at plea claim or to address the claims Mr. Moen personally raised either in its notice or its order dismissing the case after Mr. Moen submitted additional documents. In response to the district court's notice and the state's motion, Mr. Moen contended the state was required to respond to each of his arguments. A 337.

As discussed above, due process requires that a post-conviction applicant be given a meaningful opportunity to raise his claims and the fundamental requirement of due process is the opportunity to be heard at a meaningful time in a meaningful manner. In part, this requirement is protected because an applicant is entitled to notice of the trial court's contemplated grounds for dismissal and an opportunity to respond before a petition for post-conviction relief is dismissed. *See* I.C. § 19-4906(b); *Ridgley v. State,* 148 Idaho 671, 676, 227 P.3d 925, 930 (2010). Similarly, if the state moves to dismiss an application under Idaho Code § 19-4906(c), the court cannot dismiss a claim on a ground not asserted by the state in its motion unless the court gives the twenty-day notice required by Section 19-4906(b). *Saykhamchone v. State*, 127 Idaho 319, 322, 900 P.2d 795, 798 (1995). The notice procedure is necessary so that the applicant is afforded an opportunity to respond and to establish a material issue of fact if one exists. *Baxter v. State*, 149 Idaho 859, 865, 243 P.3d 675, 681 (Ct. App. 2010); *Flores v. State*, 128 Idaho 476, 478, 915 P.2d 38, 40 (Ct. App. 1996). However, even if notice was deficient, this Court can affirm where an applicant responds to a notice of intent to dismiss and fails to provide sufficient evidence to

support a claim. *Ridgley,* 148 Idaho at 676, 227 P.3d at 930; *Baxter v. State*, 149 Idaho at 865, 243 P.3d at 681.

Neither the state's motion nor the district court's notice addressed the claims Mr. Moen raised pro se. Even if the district court was not obligated to address the documents Mr. Moen submitted while still represented, it was obligated to address the later submissions raising the same issues, which were filed after the district court deprived Mr. Moen of counsel. As discussed above, those claims presented viable arguments and Mr. Moen was thus harmed by the lack of notice and opportunity to respond.

Accordingly, Mr. Moen's right to due process was violated when the district court sua sponte dismissed several of his claims without notice and the case must be remanded to provide Mr. Moen with a meaningful opportunity to cure any deficiencies.

V. CONCLUSION

Mr. Moen respectfully asks this Court to reverse the district court's judgment dismissing his post-conviction claims and to remand this case for further proceedings.

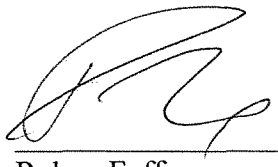
Respectfully submitted this 3 day of December, 2013.

NEVIN, BENJAMIN, McKAY & BARTLETT LLP

Robyn Fyffe

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3 day of December, 2013, I caused two true and correct copies of the foregoing to be mailed to: Office of the Attorney General, P.O. Box 83720, Boise, ID 83720-0010.



Robyn Fyffe